No. 74-124

AUG 15
MICHAEL RODAK, JR.

In The
Supreme Court of the United States

OCTOBER TERM, 1974

BLUE CHIP STAMPS, et al.,

Petitioners,

v.

MANOR DRUG STORES, On Behalf of Itself and All Other Users of Blue Chip Stamps Who Were Entitled But Failed to Purchase Stock of Blue Chip Stamps.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. .....

In The
Supreme Court of the United States

October Term, 1974

Blue Chip Stamps, et al.,

Petitioners,

v.

Manor Drug Stores, On Behalf of Itself and All Other Users of Blue Chip Stamps Who Were Entitled But Failed to Purchase Stock of Blue Chip Stamps.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Pursuant to Supreme Court Rule 19, petitioners* pray for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, which reversed a decision of the United States District Court for the Central District of California granting petitioners' motions to dismiss the first amended complaint for failure to state a claim upon which relief could be granted.

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*Petitioners, the named defendants in this action, are Blue Chip Stamps, Blue Chip Stamp Company, Alexander's Markets, Lucky Stores, Inc., Market Basket, Purity Stores, Inc., Ralphs Grocery Company, Safeway Stores, Inc., Thriftimart, Inc., Thrifty Drug Stores Co., Inc., Vons Grocery Co., Robert E. Alexander, Donald A. Koeppel, Leonard H. Straus, William F. Ramsey, Robert E. Laverty, Richard Ralphs, John R. Niven and Fred Von der Ahe.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals are set forth in Appendix A hereto. The order of the court of appeals denying the petitions for a rehearing *in banc* and modifying the majority and dissenting opinions is set forth in Appendix B hereto. The opinions of the panel, as modified, are reported in 492 F.2d at 136. The opinion and order of the district court, reported in 339 F. Supp. at 35, is set forth in Appendix C hereto.

JURISDICTION

On October 15, 1973, a panel of the court of appeals entered its decision reversing the district court's dismissal of the first amended complaint. The matter was ordered remanded for further proceedings. On October 26, 1973, a judge of the court of appeals extended the time for petitioning for a rehearing *in banc* and ordered the mandate stayed. Timely petitions for a rehearing *in banc* were then filed. On April 1, 1974, an order was entered denying the petitions and making minor changes in the panel's opinions. Five active circuit judges noted that they would have granted a rehearing *in banc*. On June 21, 1974, Mr. Justice Douglas extended the time for filing this petition to and including August 15, 1974. This petition is, therefore, timely. 28 U.S.C. § 2101(c). The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), and in accordance with Supreme Court Rule 19.

QUESTIONS PRESENTED

1. Can a person who has never owned, purchased or sold securities have standing under section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5 of

the Securities and Exchange Commission to sue for damages allegedly occasioned by his failure to purchase securities offered him?

2. Can a person who is not a party to a federal antitrust consent decree assert in a separate action rights alleged to derive from that decree?

3. Does granting standing to sue for damages under section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5 of the Securities and Exchange Commission to a person who allegedly declined to purchase offered securities because of an unduly pessimistic prospectus irreconcilably conflict with the purposes of the Securities Act of 1933?

STATUTORY PROVISIONS INVOLVED

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78*j*(b), provides in pertinent part:

> "§ 78*j*. Manipulative and deceptive devices
>
> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —
>
> ". . . .
>
> "(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated by the Securities and Exchange Commission, provides as follows:

> "§ 240.10b-5 Employment of manipulative and deceptive devices.
>
> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security."

Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, is set forth in pertinent part in Appendix D hereto.

STATEMENT OF THE CASE

Petitioners seek review of a 2-1 decision of a panel of the United States Court of Appeals for the Ninth Circuit reversing an order of the United States District Court for the Central District of California dismissing the first amended class action complaint for failure to state a claim upon which relief could be granted. The

district court had ruled that the respondent lacked standing under section 12 of the Securities Act of 1933, under section 10(b) of the Securities Exchange Act of 1934 and under rule 10b-5 of the Securities and Exchange Commission to sue for damages allegedly occasioned by its failure to purchase securities which were offered to it. The district court also ruled that respondent lacked standing to assert rights allegedly created by an antitrust consent decree to which it was not a party.

1. Allegations of the complaint.

Because the district court decided this matter on motions to dismiss, this petition assumes the truth of the averments of the first amended complaint and its supporting exhibits, which are incorporated into the complaint by reference.* The facts there set forth are as follows.**

In 1963 the government filed a civil antitrust action under the Sherman Act against Blue Chip Stamp Company and nine of its shareholder corporations. (App. E at 5.) In 1967 the action terminated with the entry of a consent decree. (App. E at 5, 20-32.) *See United*

*The first amended complaint and certain of its exhibits comprise Appendix E hereto. Other exhibits to the complaint, including two prospectuses, have not been reproduced because of their bulk. These exhibits are cited as they appear in the record on appeal.

**The exhibits to the first amended complaint include the consent decree and the reorganization plan approved by the antitrust court. In certain instances the complaint makes statements regarding the consent decree and the reorganization plan which are directly contradicted by those documents. Where these conflicts are relevant to this petition, petitioners will rely on the documents themselves since they are in the record and are incorporated into the complaint by reference. These discrepancies between the complaint's assertions and the source documents will explain some of the errors in the court of appeals' recital of the facts. *See, e.g.*, footnotes on pp. 7, 8 and 9, *infra*.

States v. Blue Chip Stamp Company, 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd sub nom. Thrifty Shoppers Scrip Co. v. United States,* 389 U.S. 580 (1968). In accordance with one of the provisions of that decree, defendants submitted to the antitrust court a plan for the reorganization of Blue Chip Stamp Company. (App. E at 5-6, 37-49.) The plan was ultimately approved. (App. E at 33-36.)

The reorganization plan was designed to reduce the amount of Blue Chip stock owned by the shareholder defendants in the antitrust action to not more than 43% of that outstanding. (App. E at 35-36.) It called for the organization of a new corporation, Blue Chip Stamps ("new Blue Chip"), and the issuance by it of one share of stock to Blue Chip Stamp Company ("old Blue Chip"). (App. E at 39.) Then old Blue Chip was to be merged into new Blue Chip and a total of 621,600 shares of new Blue Chip common stock were to be issued to the stockholders of old Blue Chip. (App. E at 38, 40.) To reduce the holdings of the defendant stockholders in new Blue Chip to no more than 43% the plan provided for an offering by new Blue Chip of another 621,600 unissued shares to users of old Blue Chip's trading stamp service, and a smaller offering to Blue Chip's management. (App. E at 41-46.)

In offering the 621,600 shares to the several thousand users of old Blue Chip's trading stamp service, the number offered to each user was to be proportional to past stamp usage. (App. E at 43-44.) However, these shares were not to be sold alone: They were to be part of a package, or "unit." Each unit consisted of a $100 principal amount 6½% subordinated debenture maturing in 1978, and three shares of common stock. (App. E at 6, 37, 42; R. at 97.) The offering price of a unit was to be $101. (App. E at 6, 38.) The new Blue Chip debentures were

subordinated to various categories of existing and future legal claims and causes of action, including antitrust claims and actions, as well as certain senior indebtedness. (App. E at 42; R. at 98.)

The reorganization plan and the order of the court approving the plan both contemplated that the users might not purchase all the offered units. The plan provided that after the offering, new Blue Chip's directors would take such steps "as may be necessary" to obtain "appropriate disposition of any unsubscribed shares." (App. E at 47.) And the antitrust court's order approving the plan required that within 60 days after the election of a permanent board of directors for new Blue Chip, the company "shall present to the Court a plan for the disposition of all unsubscribed shares." (App. E at 36.) No suggestion is made in the plan or the court order approving it as to how these shares would be disposed of.*

In 1968 new Blue Chip was organized and made the offering to users contemplated by the reorganization plan. (App. E at 8-9.) More than half the units offered were sold. (App. E at 9.) Respondent and the members of the class of users it purports to represent could have purchased a portion of the units in the offering, but did not do so. (App. E at 15.)

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*Neither the plan nor the antitrust court's order provided that "[a]ny of the 621,600 shares not purchased by the non-stockholding users were to be sold on the open market," as the court of appeals' opinion states (App. A at 4), and as the first amended complaint alleges. (App. E at 6-7.)

On the other hand, the plan did provide that the shareholder defendants could sell any of their own shares of new Blue Chip at any time. (App. E at 41.) And a large number of these shares were sold in 1969. *See* first footnote on p. 9, *infra*.

Respondent seeks recovery under essentially two theories. The first of these theories is found in counts one, two and three of the first amended complaint. These counts purport to state claims for relief under section 12 of the Securities Act of 1933, 15 U.S.C. § 77*l*, section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78*j*(b), and rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5.

In count one respondent avers that non-stockholder users of old Blue Chip's trading stamp service contended before the antitrust court that they "owned an interest in" old Blue Chip and some $20 million in profits it had accumulated and that in any decision of the government action the users' ownership of an interest in Blue Chip "should be decreed." (App. E at 7.)* These contentions allegedly "prompted" the provisions of the reorganization plan providing for an offering to users, an offering that allegedly was intended to be and was in fact a bargain designed to benefit the non-shareholder users. (App. E at 7-8.) Respondent avers that "the reasonable market value" of the units was and is "at least" $315.00, of which $75.00 represents one subordinated debenture and $80.00 represents one share of stock. Accordingly, "[t]he net bargain provided by said offering was . . . approximately $71.33 per share or $214.00 per unit." (App. E at 8.)**

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*The non-shareholder users of old Blue Chip's stamp service were not parties to the antitrust action, and attempts by some users to intervene were denied. *United States v. Blue Chip Stamp Company*, 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd sub nom. Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580 (1968).

**It should be noted here that nowhere in the consent decree or plan of reorganization is any mention made of the asserted claim of the users to $20 million in old Blue Chip profits. Nor is there any declaration that because of those claims, a "bargain" offering of securities was to be made to users, or that the offering was, in fact, a bargain.

Respondent alleges that old Blue Chip, new Blue Chip and the stockholders and directors named in the first amended complaint desired that respondent and the members of the class it purports to represent not "exercise their rights . . . to purchase the shares to which they were entitled" under the consent decree and plan. (App. E at 10.) In furtherance of this desire, petitioners allegedly caused the preparation of a conservative — or "negative" — prospectus which disparaged the units. (App. E at 10-14.)

Specifically, respondent complains that on the second page of the prospectus used in connection with the offering of the units was set forth, under the heading "Items of Special Interest", an index and summary of items of an adverse nature which were discussed in full elsewhere in the prospectus. (App. E at 10-11; R. at 73.) When some of the petitioners sold their own shares* over a year later (without combining them with subordinated debentures), no such list was included in the new prospectus used in connection with this secondary offering. (App. E at 11-12; R. at 107-42.)** Respondent further complains that

*An examination of the complaint and the supporting documents shows the court of appeals to have erred in suggesting that the shares later sold may have been the same shares offered in 1968 as part of the units. (App. A at n.7.) The shares offered in 1969 were owned by the selling shareholders themselves, not Blue Chip Stamps, and were part of the shares originally issued to the stockholders of old Blue Chip. (App. E at 12; R. at 116-17, 124.)

**The statement in the court of appeals' opinion that the second prospectus "made no reference" to the items on this list is incorrect. (App. A at 5.) An examination of the allegations of the complaint and the factual recitations in the two prospectuses (both of which are exhibits to the complaint and incorporated therein by reference) shows that respondent alleges the *list* was absent in the second prospectus, not that the items listed went unmentioned. (App. E at 10-11; R. at 73, 107-35.)

the first prospectus called attention to the payment of some $7.9 million in settlement of legal claims and causes of action and the pendency of an additional $29 million in claims and causes of action (to which the debentures were subordinated); to the consent decree's prohibition on service on new Blue Chip's board by directors of old Blue Chip; to the court-imposed requirement that Blue Chip offer for sale one-third of its trading stamp business in California; and to the actual and possible loss of patronage by users and the fact that Blue Chip had no assurance of continued patronage. (App. E at 11.)

The respondent contends that as a result of the use of the first prospectus it and the members of the class it purports to represent were defrauded because they did not buy any units. (App. E at 14-15.) Respondent seeks to recover as damages the difference between the $101 offering price of the unsold units and the alleged present "reasonable market value" of $315. This $214 per unit totals $21.4 million in damages for respondent's alleged class. (App. E at 8-9, 15.) Also sought is the right to buy the offered but unsold units at the 1968 offering price, attorneys' fees, interest and $25 million in punitive damages. (App. E at 18-19.)

The first amended complaint's second and third counts reassert the averments of the first count. In the second count, respondent makes the additional claim that petitioners acted with actual fraudulent intent (App. E at 15-16); in the third count, respondent contends merely that the representations were made without a reasonable basis for believing them to be true. (App. E at 16-17.)

Respondent's second theory of liability is found in the fourth count, a pendent claim. It reasserts the allegations of the first count and adds the claim that respondent and the class it purports to represent were "the express

intended beneficiaries of said final consent judgment entered into between the [United States] and [the defendants in the antitrust action] . . .", that the consent judgment provided the reorganization of old Blue Chip was to be conducted in good faith, and that the petitioners' alleged misrepresentations were "a violation of the Court imposed duty of good faith and constituted a breach of said Final Consent Judgment." (App. E at 18.) Count four seeks the same relief as counts one, two and three. (App. E at 18-19.)

2. Decision of the District Court.

The district court granted petitioners' motions for an order dismissing all counts of the amended complaint for failure to state a claim upon which relief could be granted. With respect to the fourth count, the court ruled that respondent, who had not been a party to the government antitrust suit and consent decree, lacked standing to sue for breach of the terms of the antitrust court's judgment or to assert rights alleged to derive from that decree. (App. C at 3-5.)

As for the first three counts, the district court held that the statutes and rule relied upon by respondent did not give it standing to sue. Section 12 of the Securities Act of 1933 expressly limits recovery to "purchasers" of securities, something which respondent claims not to be. (App. C at 5-6.) And under section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5 a party has standing to sue for damages only if it has entered into a transaction having the effect of a purchase or sale of securities. Since respondent did not enter into any such transaction, it lacked standing. (App. C at 6-9.)

3. Decision of the Court of Appeals.

Respondent took an appeal to the United States Court of Appeals for the Ninth Circuit. The matter was briefed, argued and on March 2, 1972, submitted to a panel consisting of Judges Browning, Hufstedler and Choy. On March 17 the panel vacated the submission and requested that the SEC file a brief as an *amicus curiae*. The SEC submitted a brief advocating complete abandonment of the rule of *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952), that one has standing to sue for damages under rule 10b-5 only if he can be considered to have been a purchaser or seller of securities. Both petitioners and respondent filed briefs directed to the SEC's arguments and the matter was resubmitted.

On July 20, 1972, the panel requested that the parties and the SEC file memoranda on the unanimous decision by another panel of the circuit in *Mount Clemens Industries, Inc. v. Bell*, 464 F.2d 339 (9th Cir. 1972) (Chambers, Koelsch and Ely, JJ.). This decision, rendered June 28, 1972, adopted the *Birnbaum* rule in the Ninth Circuit. The parties and the SEC filed memoranda and the matter stood submitted in the fall of 1972.

The panel handed down its decision on October 15, 1973. Judge Browning, writing for himself and Judge Choy, reversed the district court and remanded the matter for further proceedings.

In finding that the respondent had standing to sue for damages, the majority reasoned as follows: The purpose of section 10(b) of the 1934 Act and rule 10b-5 is to protect the purity of stock transactions against manipulative and deceptive practices such as are alleged by respondent, and it is irrelevant to this purpose that a

purchase or sale never actually occurred. The requirement that a plaintiff in a damage action be a purchaser or seller, the majority asserted, rests on the assumption that unless a plaintiff alleges that he purchased or sold stock involved in the fraud, his chances of proving his case are too slight to allow the action to proceed. (App. A at 6-9.) This assumption is usually justified because of the lack of objective evidence regarding causation and damages. (App. A at 9.) However, the majority noted, plaintiffs who have been parties to a contract to purchase or sell securities have been granted standing to sue for damages, even though there was no consummated purchase or sale. It concluded that the consent decree served as a "functional equivalent" of a contract to purchase, reducing the speculative nature of respondent's causation and damage claims sufficiently to satisfy what the majority saw as the purpose of the purchaser-seller standing requirement. (App. A at 9-11.)

Judge Hufstedler, in dissent, said of the majority's ruling that it amounts to a rejection of the purchaser-seller rule in any case where a plaintiff can allege causation and damages (App. A at 15-18), that it cannot be reconciled with the cases denying non-parties to antitrust consent decrees standing to sue on those decrees (App. A at 13-15 & n.3), and that it makes possible damage actions by non-participants in the securities markets who risk nothing and simply watch from the sidelines. (App. A at 20-22.)

On November 5, 1973, a rehearing *in banc* was requested; on April 1, 1974, it was denied. Judges Koelsch, Ely, Hufstedler, Trask and Wallace noted their votes to rehear the case *in banc*. The order denying the rehearing also made minor changes in the opinions of both the panel majority and the dissenter. (App. B.)

REASONS FOR GRANTING THE WRIT

The decision of the panel majority warrants review by this Court.

1. The Decision Below Conflicts with Decisions In the Second, Third, Fifth, Sixth and Eighth Circuits which Deny Standing to Sue for Damages Under Rule 10b-5 to One Who Was Neither a Purchaser Nor a Seller of Securities.

The rule of *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952), that only purchasers or sellers of securities have standing to sue under section 10(b) and rule 10b-5 for damages, has been consistently followed over the years. The Second Circuit has repeatedly reaffirmed *Birnbaum*. In *Greenstein v. Paul*, 400 F.2d 580 (2d Cir. 1968), the court again noted that a non-selling shareholder did not have standing to sue for damages under rule 10b-5:

> "It has long been the rule in this circuit that to maintain an action under § 10(b) of the Act and Rule 10b-5 of the Securities and Exchange Commission the plaintiff must have been a seller of the stock involved. *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (C.A. 2, 1952), *cert. denied*, 343 U.S. 956, 72 S.Ct. 1051, 96 L.Ed. 1356 (1952). Although criticized, *Entel v. Allen*, 270 F. Supp. 60, 70 (S.D.N.Y. 1967), it is still the rule at least insofar as actions for damages are concerned." 400 F.2d 580, 581.

Accord, Haberman v. Murchison, 468 F.2d 1305, 1311 (2d Cir. 1972).

The Third, Fifth, Sixth and Eighth Circuits have all joined the Second Circuit in refusing standing to sue for damages to one such as respondent who is not a pur-

chaser or seller of securities. *E.g., Landy v. Federal Deposit Insurance Corp.*, 486 F.2d 139, 156-57 (3d Cir. 1973), *cert. denied*, 42 U.S.L.W. 3595 (April 22, 1974); *Rekant v. Desser*, 425 F.2d 872, 879 (5th Cir. 1970); *Sargent v. Genesco*, 492 F.2d 750, 763 (5th Cir. 1974); *Simmons v. Wolfson*, 428 F.2d 455, 456 (6th Cir. 1970), *cert. denied*, 400 U.S. 999 (1971); *City National Bank of Fort Smith, Arkansas v. Vanderboom*, 422 F.2d 221, 227-28 (8th Cir.), *cert. denied*, 399 U.S. 905 (1970); *Vanderboom v. Sexton*, 422 F.2d 1233, 1243 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970); and *Erling v. Powell*, 429 F.2d 795, 799-800 (8th Cir. 1970).

The Seventh Circuit has said it has permitted a non-purchasing, non-selling investor to sue for damages under rule 10b-5. *Eason v. General Motors Acceptance Corporation*, 490 F.2d 654 (7th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3595 (April 22, 1974) (Burger, C.J., Douglas and White, JJ., dissenting from denial of certiorari; Powell, J., not participating).* But until the ruling below, no circuit had even suggested granting standing to sue for damages to non-purchasing, non-selling, non-investing offerees.

*In *Eason* the plaintiffs were investors who held shares in the defrauded corporation and who had executed personal guarantees of notes in connection with the allegedly fraudulent transaction that resulted in the issuance of 7,000 shares of their corporation's stock to defendants. They asserted their 10b-5 claims in response to a suit by a defendant on the guarantees. On these facts it could be argued that the fraud was intimately connected with the transfer of securities. There is, therefore, substantial question as to whether *Eason* is actually inconsistent with the line of authority requiring a plaintiff to be classifiable as a purchaser or seller of securities.

But even if the plaintiffs in *Eason* were in fact not purchasers or sellers, that decision is still at odds with the decision below. For the *Eason* court said it was allowing standing to investors because they were protected by the rule and the section; it nowhere suggested that non-investors were within the protection of the rule and section, or that they should be granted standing.

The long standing purchaser-seller limitation retains its vitality. *See Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 & n.10 (1971). In injunction actions non-purchasing, non-selling stockholders have been allowed standing to sue for preventive relief from fraud which, if successful, would harm a selling shareholder. But in so ruling the courts have drawn a clear distinction between actions seeking injunctive relief and actions seeking damages. *See Mutual Shares Corp. v. Genesco, Inc.*, 384 F.2d 540, 546-47 (2d Cir. 1967); *Greenstein v. Paul*, 400 F.2d 580, 581 (2d Cir. 1968); *Kahan v. Rosenstiel*, 424 F.2d 161, 173 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970). The "forced seller" cases also show the continuing strength of the purchaser-seller limitation while adapting it to particular circumstances. *See, e.g., Vine v. Beneficial Finance Co.*, 374 F.2d 627 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967); *Coffee v. Permian Corp.*, 434 F.2d 383, 385-86 (5th Cir. 1970), *cert. denied*, 412 U.S. 920 (1973).

The decision of the Ninth Circuit here stands alone as abrogating the purchaser-seller rule and enunciating a rule that permits any plaintiff to bring a damage action under 10b-5 if he can allege causation and damages with any plausibility.

The panel majority attempted to create the illusion that its decision was no departure from existing purchaser-seller authority by reasoning that persons who are parties to enforceable contracts to buy or sell securities have been permitted standing to sue for damages because those contracts eliminate the speculativeness of their damage claims; since the consent decree here is the "functional equivalent" of a contract to purchase or sell, the majority reasoned, that line of authority supports respondent's standing. (App. A at 9-10.)

The majority's reasoning is defective. The cases relied upon fail to provide the sought after support.* And the speculative nature of respondent's claim is not reduced sufficiently by the fact of the consent decree to set respondent apart from any other person who declined to purchase securities in the course of an offering made to an identifiable group of persons at a fixed price. Any such non-purchasing offeree could, like respondent, state a claim that could not be summarily disposed of by alleging that it would have bought the securities but for the defendant's actions, and that the securities were worth more than the asking price. (*See* App. A at 9-10.) To grant standing to such a plaintiff is clearly to throw over the purchase-seller limitation and invite the filing of actions on behalf of large classes of non-purchasing, non-selling, non-investors.

Under the decision of the panel one would have to have purchased or sold securities to obtain standing to sue for damages *only* when he was not creative enough to allege facts that would give his claims the appearance of non-speculativeness. This ruling is erroneous and conflicts directly with every other court that has considered the issue.

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*The cases involving contracts to buy or sell securities relied upon by the majority, such as *Commerce Reporting Co. v. Puretec, Inc.*, 290 F. Supp. 715 (S.D.N.Y. 1968), permitted plaintiffs standing to sue because the 1934 Act defines the terms "purchase" or "sale" as including *a contract* to purchase or sell securities, not because the contracts were thought to limit the speculative character of the plaintiffs' claims.

As Judge Hufstedler notes, considerations other than barring speculative claims underlie the purchaser-seller standing requirement, considerations the majority wholly ignores. (App. A at 18-21.)

2. The Decision Below Conflicts with Decisions of This Court and the Eighth Circuit which Refuse To Permit a Non-Party to a Consent Decree to Assert In a Separate Proceeding Rights Alleged to Derive From that Consent Decree.

If this case is to be read as consistent with the purchaser-seller line of authority, and respondent is to be distinguished from any other disappointed plaintiff complaining of his failure to buy offered securities, that distinction can only be that the consent decree conferred upon respondent special rights, rights that are analogous to enforceable contractual rights and qualify it for standing under the purchaser-seller rule. But to the extent the majority accepted the respondent's averments that the consent decree was intended to confer on the non-shareholder users of Blue Chip's trading stamp service rights that can be indirectly enforced through a securities act suit, then the decision below is in conflict with this Court's decision in *United States v. Armour & Co.*, 402 U.S. 673 (1971), and with the Eighth Circuit's decision in *Data Proc. Fin. & Gen. Corp. v. International Bus. Mach. Corp.*, 430 F.2d 1277 (8th Cir. 1970), *affirming sub nom. Control Data Corp. v. International Bus. Mach. Corp.*, 306 F. Supp. 839 (D. Minn. 1969).

The majority's opinion relies heavily upon the first amended complaint's averments that under the consent decree the respondent had a "right" to purchase the securities offered, and that the court and government "intended" the offering to be a "bargain" to compensate the non-shareholder users for their "interest" in old Blue Chip's retained profits. And all this was supposedly "prompted" by the arguments presented to the antitrust court by users who were not parties to the government case. (App. A at 3-4.) By referring to these averments

the court suggests that the respondent and its purported class were intended to be the recipients of very direct and substantial benefits under the decree, benefits to which they had a right.

The consent decree, however, does not mention the offering, and the plan of reorganization provides only that the units are to be offered to the users. Neither the decree nor the plan mentions the asserted claims of the users to $20 million in old Blue Chip profits, or states that the offering is intended to be or will in fact be a "bargain" offering.

In *United States v. Armour & Co.*, 402 U.S. 673 (1971), the government sought certain relief under the 1920 meatpackers' consent decree on grounds that it was necessary to effectuate the decree's purposes. In affirming a denial of the requested relief the Court held that consent decrees, unlike decrees entered after full litigation through judgment, cannot be said to have any purposes. Rather, the parties to the decree have purposes which are generally opposed to each other.

> "[T]he resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written . . . ." 402 U.S. at 681-82 (footnote omitted).

Accordingly, the court of appeals should have ignored the allegations of the complaint which refer to the purposes of the decree and the intentions of the parties and non-parties, since they find no support in the text of either decree or plan. In failing to so do the court brought itself into direct conflict with *Armour*.

If this case is distinguished from any other brought by a non-purchasing, non-selling, non-investor because of respondent's alleged rights under the decree, then it is also in conflict with *Data Proc. Fin. & Gen. Corp. v. International Bus. Mach. Corp.*, 430 F.2d 1277 (8th Cir. 1970), *affirming sub nom. Control Data Corp. v. International Bus. Mach. Corp.*, 306 F. Supp. 839 (D. Minn. 1969). In this Eighth Circuit decision, which is not mentioned in the majority's opinion, claims were made by non-parties to earlier consent decrees that they were the intended beneficiaries of those decrees and had a right to relief if the defendant thwarted their realizing those benefits. The district court ordered the claims stricken from the pleadings.

The court reasoned that the Attorney General is the representative of the public in government antitrust suits, and under established authority only parties can derive rights from or sue to enforce a consent decree terminating a government action. The pro-consent decree policies underlying this rule also require that non-parties to decrees, even if direct and intended beneficiaries, be denied standing to do, through a separate suit bottomed upon the obligations imposed by the decree, what they could not do directly — enforce the decree. 306 F. Supp. at 845-48. The actions were ordered to proceed as though the decrees had never been entered.* The court of appeals

*The court in *Control Data* suggested two avenues by which respondent here might have presented its alleged grievances regarding the prospectus and the offering.

(Footnote continued on following page.)

affirmed, having approved the district court's reasoning. 430 F.2d at 1278.

The decision of the majority below is potentially destructive of the Department of Justice's program for terminating most government antitrust actions *via* consent decree. If antitrust defendants cannot be assured that their liabilities under a negotiated consent decree will be limited to those agreed to by the parties to the action, then they will be much more reluctant to give up their right to litigate.

Moreover, defendants in hundreds of government actions have entered consent decrees over the years with the understanding that their liabilities were carefully circumscribed. The decision below would work a retroactive revision of those decrees by allowing non-parties to

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(Footnote continued from preceding page.)

First, the respondent might have attempted to persuade the Antitrust Division of the Department of Justice that the decree had been frustrated by petitioners' alleged misrepresentations, and that corrective action should be sought by the government from the antitrust court. (The decree provides for a reservation of jurisdiction by the antitrust court to entertain applications by "any of the parties" for enforcement or modification of the decree, or to punish violations of it.) Apparently the respondent chose not to attempt to persuade the government of the correctness of its views regarding the decree. Or perhaps the attempt was made, but was unsuccessful.

Alternatively, respondent might have applied for leave to intervene in the antitrust case as a party. Instead, respondent chose to commence this class action seeking damages under the federal securities laws, and a state court class action raising the same claims under California law. *Manor Drug Stores, etc. v. Blue Chip Stamps, et al.*, No. C-5652 in the Superior Court, County of Los Angeles. (The state action has been in abeyance pending disposition of the federal action.)

It might also be noted that the antitrust court made no adjudication with respect to the rights of the users; any rights the users possessed before entry of the decree were unaffected by its entry, by the plan, or by the offering. Yet respondent has never made any attempt to assert its supposed "rights" to $20 million in retained old Blue Chip profits.

come forward and claim enforceable rights under them. Such a result may well deny due process to those who gave up their right to defend themselves in exchange for a negotiated decree. *See United States v. Armour & Co.*, 402 U.S. at 681-82; *Control Data Corp. v. International Bus. Mach. Corp.*, 306 F. Supp. at 846-48.

3. The Decision Below Directly Conflicts with the Securities Act of 1933 and its Policy of Discouraging Unduly Optimistic Prospectuses.

The decision of the court below presents an important question of federal law that has not been, but should be, settled by this Court. The rule established by the court below will result in those preparing prospectuses being exposed to suit by a non-purchaser under the Securities Exchange Act of 1934 if the stock issued rises in value and the prospectus appears to have been too negative, and to suit by a purchaser under the Securities Act of 1933 if the stock declines in value and the prospectus appears to have been too positive. This result upsets the balance between the 1933 and 1934 Acts maintained by the purchaser-seller rule and will produce results inconsistent with the policies of the 1933 Act.

The Securities Act of 1933 requires that all material facts, including adverse potentialities such as those which respondent complains were unduly emphasized by Blue Chip, be disclosed in a prospectus. *See, e.g., Lanza v. Drexel & Co.*, 479 F.2d 1277 (2d Cir. 1973) *(in banc)*; *Escott v. BarChris Const. Corp.*, 283 F. Supp. 643, 680-81 (S.D.N.Y. 1968); *Feit v. Leasco Data Processing Equipment Corp.*, 332 F. Supp. 544, 569-71 (E.D.N.Y. 1971) (collecting and analyzing the authorities). And the adverse facts cannot be merely disclosed: They must be

given an emphasis sufficient to convey their importance and the risk they portend for the investor. *See Mills v. Electric Auto Lite Co.*, 403 F.2d 429, 434 (7th Cir. 1968), *vacated on other grounds*, 396 U.S. 375, 381 & n.4 (1970); *Richland v. Crandall*, 262 F. Supp. 538, 553-54 (S.D.N.Y. 1967); *Feit v. Leasco Data Processing Equipment Corp.*, 332 F. Supp. at 564-65. The SEC has held that a failure to emphasize pertinent risk factors in a prospectus and in a registration statement constitutes a material failure to comply with the disclosure requirements of the 1933 Act. *E.g., Doman Helicopters, Inc.*, 41 S.E.C. 431, 439 (1963); *Universal Camera Corp.*, 19 S.E.C. 648, 652, 654-56 (1945). See S.E.C. Release No. 4936, *Guides for Preparation and Filing of Registration Statements*, p. 6, ¶ 6 (1968).

This requirement of disclosure of and emphasis on adverse matters comports with Congress' purpose of protecting investors from issuers "puffing" the value of their securities by minimizing the risks inherent in their purchase. *See* H.R. Rep. No. 85, 73d Cong., 1st Sess. 2, 8 (1933).

To back up this policy, Congress enacted, *inter alia*, section 11 of the 1933 Act, 15 U.S.C. § 77k.* This section permits a purchaser to sue the issuer for damages occasioned by a *decline* in the price of the purchased securities, without regard to reliance by the purchaser upon the prospectus. He need show no more than that the prospectus (which is filed with and constructively constitutes a portion of the registration statement) contains "an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make statements therein not misleading." The non-negligence of the issuer is no defense to such an action.

*Relevant portions of this statute are contained in Appendix D hereto.

§ 11(b), 15 U.S.C. § 77k(b). "Section 11 creates almost absolute liability in the issuer." *Feit v. Leasco Data Processing Equipment Corp.*, 332 F. Supp. 544, 575 (E.D.N.Y. 1971) (citing authorities). Substantially similar liability is imposed by section 11 upon directors of the issuer. "Their liability approaches that of the issuer as guarantor of the accuracy of the prospectus." 332 F. Supp. at 578.

These directives under the 1933 Act force a prospectus draftsman to disclose fully and to emphasize amply adverse contingent matters and his predictive judgment as to the impact they may have on the business in the future. By couching his descriptions and predictions in conservative and cautionary terms, he can seek to protect both the issuer and its directors from liability under section 11, and the purchaser from buying without fully appreciating the risks of the investment.

Now, in the face of the policy of the 1933 Act that adverse matters must not be understated, comes the decision of the majority below holding that one who does not purchase offered securities can sue for damages under section 10(b) of the 1934 Act and rule 10b-5 if the adverse matters appear in hindsight to have been overstated. The prospectus draftsman is confronted with an almost impossible task: (i) disclose and adequately emphasize adverse contingencies, on pain of purchasers suing to recover for a disclosure which underestimated the risks involved; and (ii) do not unduly emphasize adverse contingencies, on pain of non-purchasers suing to recover damages for a disclosure which over-estimated the risks of the investment.

The rule adopted by the court below will increase the probability that a given prospectus will be overly optimistic, or at least will give less than full emphasis to

adverse facts — an effect that flies in the face of the congressional intent underlying the 1933 Act. In the final analysis, the investing public will receive less protection against "puffing" than presently exists and issuers will have an immensely greater exposure to liability, and almost certain exposure to costly litigation. Neither exposure will be avoidable.*

The decision below should be reversed. In this area the purchaser-seller limitation serves to harmonize the 1933 and 1934 Acts and provides a buffer zone within which those preparing prospectuses can work.

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*It seems inevitable that every prospectus will contain predictive judgments which, when viewed in the bright gleam of hindsight, will appear to have been wrong. In this case the testing period was more than two years. The amended complaint was filed in January of 1971; the prospectus was dated August of 1968.

It is no answer to this conflict between the 1933 Act and the 1934 Act to argue that while the former fixes liability without fault, the latter does not. Whatever the final standard a trier of fact may apply to a given prospectus and its purposes, the fact remains that under the majority's reasoning nothing is required to state a cause of action that will survive attempts at summary disposition other than conclusory allegations that defendant had an intent to mislead, that the prospectus was too negative, and that the plaintiff did not purchase for that reason. This means that almost any non-purchasing offeree can impose on an issuer and its directors the burdens and uncertainties of litigation, and resist attempts to resolve the matter short of trial. A device more subject to abuse would be hard to imagine. And the expense of such actions will ultimately be borne by those who did purchase the offered securities.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August, 1974

Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MANOR DRUG STORES AND ALL OTHER USERS OF BLUE CHIP STAMPS WHO WERE ENTITLED BUT FAILED TO PURCHASE STOCK OF BLUE CHIP STAMPS, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs-Appellants,

vs.

BLUE CHIP STAMPS, a corporation, BLUE CHIP STAMP COMPANY, a merged corporation, LUCKY STORES, INC. MARKET BASKET, a corporation, PURITY STORES, INC., RALPHS GROCERY COMPANY, a corporation, SAFEWAY STORES, INC., THRIFTIMART, INC., THRIFTY DRUG STORES CO., INC., VONS GROCERY CO., a corporation, ROBERT E. ALEXANDER, DONALD A. KOEPPEL, LEONARD H. STRAUS, WILLIAM F. RAMSEY, ROBERT E. LAVERTY, RICHARD RALPHS, JOHN R. NIVEN, FRED VON DER AHE,

Defendants-Appellants.

No. 71-2223
OPINION

[October 15, 1973]

Appeal from the United States District Court
for the Central District of California

Before: BROWNING, HUFSTEDLER, and CHOY, Circuit Judges

BROWNING, Circuit Judge:

The district court dismissed appellants' complaint under section 10(b) of the Securities Exchange Act of 1934,[1] 15 U.S.C. § 78j(b), and Securities and Exchange Commission Rule 10b-5,[2] claiming damages for alleged fraud in connection with an offering of stock of appellee Blue Chip Stamps to appellant and the class it seeks to represent. The court held that because appellant and other members of the class did not purchase the stock they lacked standing to sue under the rule announced in *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir. 1952).[3] We conclude that it does not appear "beyond doubt" that appellant "can prove no set of facts in sup-

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[1]Section 10(b) of the Act provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –

(b) To use or employ, *in connection with the purchase or sale of any security* registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. (Emphasis added.)

[2]The Rule provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person *in connection with the purchase or sale of any security.* (Emphasis added.)

port of [its] claim that appellant "can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). We therefore reverse.

The alleged facts are as follows.[4]

In 1963 the United States filed a complaint charging Blue Chip Stamp Company, Thrifty Drug Stores Co., Inc., and eight grocery chains with conspiracy to restrain trade and monopolization in the trading stamp business in California, in violation of the Sherman Act. This litigation was settled in 1967 by entry of a consent decree. *See United States v. Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Calif. 1967).

The defendants in the antitrust suit, other than Blue Chip Stamp Company, were major California retail merchandisers who used Blue Chip stamps to stimulate patronage in their businesses. They owned 90 per cent of Blue Chip Stamp Company's stock.

Other retailers who used Blue Chip stamps in their business but owned no stock in Blue Chip Stamp Company (a group that includes appellant and others in the class it seeks to represent) appear [sic.] before the court in the antitrust proceeding as amicus curiae. They contended that Blue Chip Stamp Company was to have been a non-profit venture on behalf of all users of Blue Chip

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[3]This court adopted the *Birnbaum* rule in Mount Clemens Industries, Inc. v. Bell, 464 F.2d 339 (9th Cir. 1972). *See also* Lanning v. Serwold, 474 F.2d 716 (9th Cir. 1973); Walling v. Beverly Enterprises, ... F.2d ..... (9th Cir. April 9, 1973).

[4]Some minor details are drawn from material submitted by appellant to this court. They are appropriately considered as reflecting the nature of the facts that might have been established under the allegations of the complaint. *See* Herpich v. Wallace, 430 F.2d 792, 809 (5th Cir. 1970); Shell v. Hensley, 430 F.2d 819, 822 n.8 (5th Cir. 1970.)

stamps, and that they (the non-stockholding users) in fact owned an equitable interest in Blue Chip Stamp Company and in the $20,000,000 in profits it has accumulated. They asked that this interest be recognized in the decree.

These claims and contentions on behalf of the non-stockholding retail users of Blue Chip stamps "prompted the provisions" of the consent decree requiring the reorganization of Blue Chip Stamp Company. Under the reorganization plan eventually approved, Blue Chip Stamp Company was to be merged into a new company—Blue Chip Stamps. The defendant stockholder-users were to be divested of 55 percent of their interest in the enterprise. This was to be accomplished by issuing to others 55 percent of the common stock of the new company; 621,600 shares of the common stock of the new company were to be offered to the retail users of Blue Chip stamps who were not stockholders of the old company. The shares were to be offered on a pro-rata basis determined by the quantity of stamps issued to each of these non-stockholding users during a designated period. The offering was to be made in units consisting of three shares of common stock and a $100 debenture for a cash payment of $101. Any of the 621,600 shares not purchased by the non-stockholding users were to be sold on the open market.

The offer of debentures and stock to non-stockholding users was intended by the court and government to be, and was, a bargain. Each unit offered to the non-stockholding user for $101 had a reasonable market value of $315, as defendant-appellees knew.

Users who were stockholders in the old company (including the defendant-appellees in this case)[5] did not want the non-stockholding users to exercise their right to purchase stock in the new company. To accomplish their purpose they caused to be prepared and circulated a prospectus "calculated to mislead and dissuade users not knowledgeable of the true value of said shares from purchasing said shares." The prospectus repeatedly emphasized certain "Items of Special Interest" as having an adverse effect upon the value of the offered stock.[6] "Constant reference to said items was intended to, and did cause plantiffs to be misled as to the true value of said shares." When defendant-appellees offered "their own" shares to the public a year later,[7] the prospectus then issued made no reference to any of these "Items of Special Interest," although they were as relevant (or

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[5]Defendant-appellees are Thrifty Drug Stores Co., Inc., seven of the eight grocery chains that were defendants in the antitrust suit, the old Blue Chip Stamp Company, the new Blue Chip Stamp Corporation, and the members of the board of directors of the latter.

[6]One such item was the pendency of claims against the company said to "aggregate approximately $29,000,000." Defendant-appellees allegedly knew the claims "were of insignificant merit"; they were settled for less than $1,000,000.

In addition to reference to the "Items of Special Interest," the complaint alleges other misleading statements, including an estimate that 97½% of the Blue Chip stamps issued by the new company would be redeemed when historically less than 90% were redeemed. This alleged misrepresentation "resulted in an understatement of earnings on stamp sales for the year prior to the offering of Six Million Dollars ($6,000,000) or about eighty per cent (80%)."

[7]It is unclear from the complaint whether the unsold shares originally offered to non-stockholding users were eventually sold, and at what price. The complaint mentioned sales by defendants of "their own" shares, although plaintiff-appellant's brief indicates that the same shares offered to them "were offered to the general public one year later." The facts may be resolved in further proceedings.

irrelevant) on the date of the second prospectus as they had been on the date of the first.

Defendant-appellees, by these and other means, intended to and did mislead plaintiff-appellant and other user-offerees as to value of the stock. Plaintiff-appellant and others in the class it represents, relying upon these representations, "were induced and did, in fact, not accept said offer and purchase said Units," and were thereby damaged in the amount of the difference between the offering price of the units and their fair market value.

We are not satisfied that these allegations establish on their face that appellant is barred from maintaining the action by the judicially created "purchaser-seller" prerequisite to standing to sue for damages under section 10(b) and Rule 10b-5.

The complaint alleges the use of a fraudulent scheme involving untrue statements and omissions in offering securities of Blue Chip Stamps for sale.

The statute and rule were intended to protect the purity of stock transactions from just such manipulative and deceptive practices that deprive potential investors of a reasonable opportunity to make informed and intelligent investment decisions.[8] It is obviously irrelevant to this purpose that the object of the deceptive practices was to prevent purchases rather than to induce them.[9]

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[8]Affiliated Ute Citizens v. United States, 406 U.S. 128, 151, 153 (1972); Superintendent of Insurance v. Bankers Life & Cas. Co., 404 U.S. 6, 12 (1971); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967); Herpich v. Wallace, 430 F.2d 792, 801, 805-06 (5th Cir. 1970); Kahan v. Rosenstiel, 424 F.2d 161, 173 (3d Cir. 1970); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 851-52, 858 (2d Cir. 1968).

[9]*See, e.g.*, Travis v. Anthes Imperial Ltd., 473 F.2d 515 (8th Cir. 1973); Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969).

And Congress and the Commission cannot have intended to prohibit such fraudulent practices if they failed but not if they succeeded. The language of the statute and rule does not require such a bizarre result. The statute and rule are not confined in terms to consummated purchases or sales. They have often been applied where, as here, "plaintiffs alleged that they had sought to enter a securities transaction as purchasers or sellers, but that the transaction was aborted as a result of the fraud of the defendants." *Mount Clemens Industries, Inc. v. Bell*, 464 F.2d 339, 345 (9th Cir. 1972), citing *Opper v. Hancock Securities Corp.*, 367 F.2d 157 (2d Cir.), *affirming* 250 F. Supp. 668 (S.D.N.Y. 1966); *Commerce Reporting Co. v. Puretec, Inc.*, 290 F. Supp. 715 (S.D.N.Y. 1968); *Goodman v. Hentz & Co.*, 265 F. Supp. 440 (N.D. Ill. 1967); and *Stockwell v. Reynolds & Co.*, 252 F. Supp. 215 (S.D.N.Y. 1965). *See also Walling v. Beverly Enterprises*, ... F.2d ..... (9th Cir. April 9, 1973).

It can hardly be doubted, therefore, that the Securities and Exchange Commission, or a private person having a sufficient interest,[10] could have obtained prophylactic injunctive relief against the defendants in a timely suit.

Thus the question is not whether the complaint alleges a violation of the statute and rule, but rather whether appellant is barred from suing for damages because it succumbed to the fraud and did not purchase the offered stock.

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[10]Private parties may maintain an action to enjoin anticipated or continuing violations of § 10(b) and Rule 10b-5 though they could not sue for damages. *See* Kahan v. Rosenstiel, 424 F.2d 161, 173 (3d Cir. 1970); Britt v. Cyril Bath Co., 417 F.2d 433, 436 (6th Cir. 1969); Mutual Shares Corp. v. Genesco, Inc., 384 F.2d 540, 546 (2d Cir. 1967).

Like the provisions of the statute and rule relating to coverage,[11] the *Birnbaum* "purchaser-seller" standing requirement is to be construed to accomplish Congress' purpose. *Herpich v. Wallace,* 430 F.2d 792, 806-07 (5th Cir. 1970), and cases there cited. If this were the sole consideration, standing would be allowed to any person whose investment decision was affected by fraud, whether the fraud caused him to buy or prevented him from doing so. In either case the fraud would frustrate Congress' purpose, as we have said; and, in either case, allowing the private remedy would serve to vindicate that purpose.[12]

The standing requirement rests in part upon other considerations, however.[13]

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[11]Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972); Superintendent of Insurance v. Bankers Life & Cas. Co., 404 U.S. 6, 12 (1971); SEC v. National Sec. Inc., 393 U.S. 453, 466-67 (1969). See also Kern County Land Co. v. Occidental Petroleum Corp., ... U.S. ...., ... (1973).

[12]*See, e.g.,* Note, *The Purchaser-Seller Requirement of Rule 10b-5 Reevaluated,* 44 U.Colo.L.Rev. 151, 154-55 (1972); Boone & McGowan, *Standing to Sue under SEC Rule 10b-5,* 49 Texas L. Rev. 617, 631, 647 (1971); Ruder, *Current Developments in the Federal Law of Corporate Fiduciary Relations-Standing to Sue under Rule 10b-5,* 26 Bus.Law. 1289, 1296 (1971); Whitaker, *The Birnbaum Doctrine: An Assessment,* 23 Ala. L.Rev. 543, 571 (1971); Note, *Inroads on the Necessity for a Consummated Purchase or Sale under Rule 10b-5,* 1969 Duke L.J. 349. 362-63 (1969).

[13]A suggestion that additional considerations may exist that give different meanings to "purchase" and "sale" as these words are used to define coverage in the statute and rule, and as they are employed in connection with the *Birnbaum* "purchaser-seller" doctrine of standing, appears in SEC v. National Sec., Inc., 393 U.S. 453 (1969). The Court stated that in defining "purchase" and "sale" as these terms are used in the statute and rule to determine coverage, the question to be asked is "whether [the] alleged conduct is the type of fraudulent behavior which was meant to be forbidden by the statute and the rule" (466-67). In a footnote at this point (467 n.9) the Court added:

Cases allowing private suits for injunctive relief make it clear that the "purchaser-seller" prerequisite to standing to sue for damages rests largely on the assumption that if plaintiff does not allege that he purchased or sold the stock involved in the fraud it is evident at the outset that his claim must fail "both on proof of loss and the causal connection with the alleged violation of the Rule." *Mutual Shares Corp. v. Genesco, Inc.*, 384 F.2d 540, 547 (2d Cir. 1967). *See also Britt v. Cyril Bath Co.*, 417 F.2d 433, 435-36 (6th Cir. 1969); *cf. Rekant v. Desser*, 425 F.2d 872, 881 (5th Cir. 1970); Boone & McGowan, *Standing to Sue under SEC Rule 10b-5*, 49 Texas L. Rev. 617, 646 (1971); Kellogg, *The Inability to Obtain Analytical Precision Where Standing to Sue under Rule 10b-5 Is Involved*, 20 Buffalo L. Rev. 93, 114-16 (1970).

This assumption is usually justified. Ordinarily there will be little proof (other than the non-purchaser's own opinion, after the loss) that the non-purchaser would in fact have purchased but for the fraud, and, if so, how much, when, or at what price; also, generally, the potential number of non-purchasers will be without definable limit. But this is not invariably true.

As we noted in *Mount Clemens Industries, Inc. v. Bell, supra, a* "common link" among many of the cases allowing non-purchasers or non-sellers to sue for damages under the statute and rule is "the existence of a contractual relationship between the parties." 464 F.2d at 345. Such contracts often furnish objective evidence of the reality of a plaintiff's intention to purchase or sell but for the

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"The case presents none of the complications which may arise in determining who, if anyone, may bring private actions under § 10(b) and Rule 10b-5. This is a suit brought by the Commission; the terms 'purchase' and 'sale' are relevant only to the question of statutory coverage. Therefore there are no 'standing' problems lurking in the case." (Citations omitted.)

fraud, and thus of causation. They may also fix the price, quantity, and time of sale, thus making it possible to calculate damages. And the existence of such contracts permits a reasonable circumscription of a defendant's potential liability by identifying from among the limitless number of possible non-purchasers those few that the defendant chose to deal with himself. *See Commerce Reporting Co. v. Puretec, Inc., supra,* 290 F. Supp. at 719.

Under the allegations of this complaint, the consent decree involved here served as the functional equivalent of the contractual relationship referred to in *Mount Clemens.* According to the complaint, the consent decree required defendant-appellees to offer particular securities to a specific, identifiable group of non-stockholding retail users of Blue Chip Stamps, including plaintiff-appellant, and plaintiff-appellant had a right to buy those securities at a fixed price and in a fixed amount.[14] The complaint alleges an objective measure of the amount of loss, based on subsequent sales by defendants. As to causation, the complaint alleges that the consent decree offer was intended to be and was a bargain; that units of

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[14]As defendant-appellees point out, plaintiff-appellant could not have directly enforced the decree. *See* Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 20 (9th Cir. 1971). Indeed, the district court dismissed a claim based upon the theory that plaintiff-appellant's damage arose out of a violation of the consent decree, and that ruling was not appealed.

The rule referred to does not bar the claim before us, however. This claim rests upon the theory that plaintiff-appellant was damaged by a violation of the Securities Exchange Act of 1934 and Rule 10b-5 prohibiting fraud in connection with the purchase or sale of securities. The fact that the securities transaction that is the subject matter of the claim was mandated by the consent decree does not immunize defendant-appellees from the statutes and rules regulating securities transactions. Plaintiff-appellant relies upon a breach of a duty imposed by these statutory anti-fraud provisions, not upon a breach of a duty imposed by the consent decree.

securities having a market value of $315 were to be offered to plaintiff-appellant for $101 — a difference so great as to provide, prima facie, an objective basis for a factual inference that users properly informed rather than misled would have accepted the offer.[15] It is also alleged that 60 per cent of those non-stockholding users who did purchase the units offered them had information as to value not made available by defendant-appellees in the prospectus.

The facts foreshadowed by plaintiff-appellant's allegations may not be forthcoming, or the suggested inferences may be shown to be untenable. If such deficiencies become apparent in pretrial proceedings, they will justify judgment short of trial. *Walling v. Beverly Enterprises, supra,* .... F.2d at .... We hold only that dismissal on the face of the complaint was premature.

Reversed and remanded for further proceedings.

HUFSTEDLER, Circuit Judge, dissenting:

The majority confers standing to bring private damage actions under section 10(b) and Rule 10b-5 upon persons who neither bought nor sold securities and who never contracted with anyone to do so. I cannot reconcile this result with existing authority in our circuit and elsewhere or with the legislative scheme of which the section and the rule are a part. The majority's justification for the result is that these nonpurchasing appellants, as members of a class benefited by a consent divestiture decree in an action to which they were not parties, had a special status that was "functionally equivalent" to the status of an in-

[15]An informed decision by plaintiff-appellant to purchase these shares could not have been thwarted by the intervention of an earlier or higher bidder, as in Mount Clemens Industries, Inc. v. Bell, 464 F.2d 339, 346 n. 11 (1972).

vestor who had a contract to buy or to sell securities. I perceive no analogy between the two and no sound reason to create a fiction to expand the reach of section 10(b) damage actions.

The result reached by the majority is inconsistent with the holding and reasoning of this court's recent decision in *Mount Clemens Industries, Inc. v. Bell* (9th Cir. 1972) 464 F.2d 339. *Mount Clemens* held that the purchaser-seller rule governs standing to bring section 10(b) damage actions in the courts of this circuit. The court then concluded that the noncontractual status of the *Mount Clemens* nonbuyer was fatal to the maintenance of his section 10(b) claim. Similarly, the noncontractual status of the nonbuyer appellants herein should be held to bar their suit.[1]

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[1]Unless some relevant distinction between the nonpurchasers in this case and the nonpurchasers in *Mount Clemens* can be asserted, appellants herein must, on authority of *Mount Clemens*, be denied standing. To be significant, the distinction must be one which would have made a difference in outcome under the reasoning of *Mount Clemens*.

The majority opinion explicitly suggests only one distinguishing feature between the two cases: "An informed decision by plaintiff-appellant to purchase these shares could not have been thwarted by the intervention of an earlier or higher bidder, as in Mount Clemens . . . ." This distinction, however, is irrelevant.

The *Mount Clemens* court made it clear that the difficulty that plaintiffs therein would have had in proving that they could have purchased the securities in question was not of governing significance in that case: "While we agree with the District Court that the claim of the appellants is highly speculative, that circumstance alone could not necessarily deprive them of the opportunity to prove a set of facts entitling them to relief." 464 F.2d 346 n.11. The court then went on to indicate the factor that was of governing significance: "The lack of an agreement, however, does distinguish the present case from those decisions which permit aborted purchasers and sellers to maintain an action for damages." *Id.*

The distinction through which the majority in this case seeks to avoid the result in *Mount Clemens*, therefore, is irrelevant, for

The majority, however, attempts to bring appellants within the class of protected investors by saying that the consent decree is the "functional equivalent of the contractual relationship referred to in *Mount Clemens.*" The majority means that appellants' status under the consent decree is analogous to that of purchasers or sellers whose contracts to buy or to sell aborted because of deceptive practices forbidden by section 10(b) and who were given standing to sue in cases that were cited and distinguished in *Mount Clemens.*

The functions of a contract and of the consent decree are, however, not equivalent. A contract to purchase or to sell a security is the equivalent of a purchase or a sale because the statute by definition makes them equivalent.[2] As *Mount Clemens* explained, the unifying link among the cases granting standing to persons who did not buy or sell "is the existence of a contractual relationship between the parties which elevated the plaintiff to the status of statutory purchaser or seller." (464 F.2d at 345.) A consent divestiture decree cannot function similarly because it is not a "contract" within the meaning of the statute and because no statutory provision equates "purchase"

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even if the claim of the plaintiffs in *Mount Clemens* had been less speculative than the appellants' claim in this case, the result in *Mount Clemens* would have been the same. Because plaintiffs therein would nonetheless have been neither actual buyers nor contractual "purchasers", they would have been denied standing. Similarly, if the outcome in this case is to be in accord with the reasoning in *Mount Clemens*, appellants must be denied standing because appellants in this case neither actually acquired shares nor entered into contracts for their acquisition.

[2]Securities Exchange Act of 1934, § 3(a), 15 U.S.C. 78c(a):

". . . .

"(13) The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire.

"(14) The terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of."

and "offer pursuant to a consent decree." The essential statutory link between the appellants and "purchasers" is missing.

The gap cannot be filled by saying, as does the majority, that a contract and the consent decree render causation and damages equally provable. Assuming that this similarity exists, it is nonetheless irrelevant. The court in *Mount Clemens* concluded that the speculativeness of a cause of action was not a ground for denying standing. (464 F.2d 346 n.11.) If speculativeness will not impair standing, a want of speculativeness cannot support standing. The ability of a plaintiff to prove causation and damages is relevant to the disposition of the merits, not to a determination of whether or not a certain plaintiff is properly before the court.

Furthermore, the appellants' ability to prove causation and damages cannot be likened to that of parties who have contracted to buy or sell. Their situations are dissimilar because a contract creates legal rights between the parties. Appellants had no duties and no rights created by the consent decree. The decree could not have been enforced against them, and they could not have enforced it, even if the parties to the action resulting in the decree had intended to benefit them specifically. *(E.g., Buckeye Co. v. Hocking Valley Co.* (1925) 269 U.S. 42; *United States v. ASCAP* (2d Cir. 1965) 341 F.2d 1063; *Control Data Corp. v. IBM Corp.* (D. Minn. 1969) 306 F. Supp. 839, *aff'd sub nom. Data Processing Financial & General Corp. v. IBM Corp.* (8th Cir. 1970) 430 F.2d 1277. *See Dahl, Inc. v. Roy Cooper Co.* (9th Cir. 1971) 448 F.2d 17, 20.[3] Because the consent decree creates no rights or

[3]A persuasive rationale for refusing to accord nonparties standing to enforce a consent decree is that the potential exposure to litigation and to liability that a contrary rule would engender would seriously impair the settlement of litigation. The public

duties in appellants, their commitment and ability to purchase the offered securities are far less definite than in a case in which a contract binds the parties. This want of definiteness renders appellants far less able to prove causation and damages than those who have contracted to buy securities and negates the "functional equivalence" that is the basis for the majority's grant of standing.

The foregoing analysis suggests that the majority does not succeed in bringing appellants within the ambit of the standing rule established in *Mount Clemens;* indeed, it does not really attempt to do so. The "functional equivalent" language masks the majority opinion's real purport, which is the creation of an exception to the purchaser-seller rule.[4] The opinion attempts to justify

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interest in obtaining consent decrees outweighs the interest of the nonparty litigants in obtaining direct vindication of their private interests. Control Data Corp. v. IBM Corp. (D. Minn. 1969) 306 F. Supp. 839, 846. If administration of the antitrust laws would be ill served by allowing direct enforcement of consent decrees by third parties, it is difficult to understand how it would be better served by the creation of "rights", like that created by the majority opinion, that permit indirect enforcement of the decrees.

[4]The purchaser-seller rule has heretofore been understood to dictate that if a plaintiff in a section 10(b) private damage action is neither a purchaser nor a seller, he does not have standing to sue. To justify its conclusion that appellants have standing, therefore, the majority either must conclude that appellants are purchasers or sellers or must seek to modify the previously established meaning of the purchaser-seller requirement. The former conclusion cannot be sustained. The majority opinion, therefore, must be viewed as arguing for the latter conclusion.

The majority in essence establishes a second basis upon which to claim standing. Under the logic of the majority opinion, a plaintiff may bring suit if either he is a purchaser or seller or he is able to prove causation and damages. The purchaser-seller rule ceases to be operative in all cases; its applicability becomes conditional upon the plaintiff's inability to prove his cause of action.

The majority apparently believes that this is no departure from prior precedent, for it writes of "the cases allowing non-purchasers

the exception by (1) implying that the purchaser-seller rule is grounded solely on a policy of denying standing where either causation or damages is dubious,[5] and (2) arguing that appellants should have standing because they could prove both elements. Neither proposition withstands scrutiny.

Although the purchaser-seller rule is occasionally buttressed by observations about the difficulties of proof that would accompany an abandonment of the rule, no authority purports to say that the potential for proving causation and damages is the essence of the rule. On the contrary, a person who is either a purchaser or seller and who alleges deception, causation, and damages can bring the action even if his ability to prove his case is nil. *(Cf. Mount Clemens Industries, Inc. v. Bell,* 464 F.2d 339, 346 n.11.) He may promptly lose on a motion for summary judgment, but his action cannot be dismissed for lack of standing. The majority opinion's effort to find sustenance for its view of the purpose of the purchaser-seller requirement in suits seeking only injunctive relief is unavailing.

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or non-sellers to sue for damages under the statute and rule." No cases allowing such plaintiffs to sue are cited. Concededly, the majority cites several cases in which the strict purchaser-seller rule was relaxed somewhat. The relaxation that those cases countenance, however, is of a different sort altogether than that which the majority proposes. The majority proposes to uncouple the standing requirement from the purchaser-seller rule. The "forced seller" and "aborted purchaser-seller" cases to which the majority refers suggest only that the words "purchaser" and "seller" be liberally defined. They do not suggest that the words become altogether irrelevant and the rule of which they are a part become inoperative in certain contexts.

[5]If the majority were to fail to assert that this policy is the sole basis for the purchaser-seller rule, the logic of the opinion would fail. Even though some policies underlying the standing requirement were satisfied in a given case, if there were also other purposes to be met, standing would not properly be granted unless the majority were to show that the other policies also were not ill served by allowing appellants to sue.

The purchaser-seller rule has only peripheral relationship to suits for an injunction.[6] A rule that no one could obtain preventive relief who could not prove that the fraud had already been consummated would be quixotic. Moreover, expansion of standing to bring suits for injunctive relief does not entail the risk of strike suits or of exposure to imponderable liability that expanded standing in damage actions threatens.

The assertion that appellants are peculiarly able to prove causation and damages and thus are separable from all other nonbuyers is also faulty. The quantity of shares offered, the price, and the time of sale are generally fixed in a securities offering. These factors, therefore, do not distinguish the offer to appellants from an offer of the same securities to the general public. Although the majority opinion says that the appellants' expectations are "rights," they are not legally cognizable rights. If the offer were withdrawn or the decree not complied with, appellants could not complain. The susceptibility of appellants' expectations to being so frustrated renders appellants' damages as difficult to prove as those of a plaintiff whose acceptance of an offer is "thwarted by the intervention of an earlier or higher bidder." Nor is it the case that causation is more easily proven by appellants than by a nonpurchasing public offeree. The majority opinion states, "ordinarily there will be little proof (other than the non-purchaser's own opinion, after the loss) that the non-purchaser would in fact have purchased but for the fraud . . ." The majority's position is reasonable, but irrelevant. One who has the opportunity

[6]Of the three cases cited by the majority, none explicitly discussed the purchaser-seller requirement, and two involved plaintiffs who were in fact purchasers or sellers. Britt v. Cyril Bath Co. (6th Cir. 1969) 417 F.2d 433, 435. *Compare* Rekant v. Desser (5th Cir. 1970) 425 F.2d 872, 876-79 *with id.* 879-82.

to purchase securities may let the opportunity pass for want of ability to take it, for failure to notice the opportunity, or for misjudgment of the market. These considerations apply as strongly to appellants' case as they do to the case of public offerees. Appellants were as free to decline the bargain for the same reasons as any other nonbuyers. Appellants are in no better position than the public offerees to claim that if they had known the truth, they would have snapped up the bargain. The argument that a person not only adequately alleges damages, but also prima facie proves causation by stating a marked disparity between the value of the security and the offering price is startling. Any nonbuyer or nonseller could easily leap the causation hurdle if that proposition were true.

Appellants are therefore in the same legal position as were the nonbuying members of the general public to whom the same securities were subsequently made available by the consent decree and who, as appellants concede, have no standing to bring a section 10(b) damage action. Appellants cannot explain why their own situation is essentially different from other nonbuyers, except that they are a more discrete group than the general public and their disappointment can be assuaged for no more than $21,000,000, rather than many times that amount. Absent such a difference, the exception to the purchaser-seller rule that the majority seeks to establish is unjustifiable.

At the heart of the majority's inability to justify its exception to the purchaser-seller rule is what I believe to be a basic misunderstanding of the role of a standing requirement in the context of securities litigation. The majority apparently believes that any plaintiff who can credibly allege the substantive elements of a cause of

action should be granted standing. However, even if litigants can allege and even prove all of the elements of a section 10(b) damage claim, they nonetheless may lack standing. The standing doctrine is not designed to thwart actions by persons who have not suffered any injury from a wrong. It is a means of foreclosing actions by persons who have been hurt by wrongs, but who, for reasons of legislative, judicial, or social policy, are outside of the class of persons who are given a particular kind of remedy for the injury.[7] A federal standing requirement insures that litigants are sufficiently adverse to satisfy the case or controversy requisite of Article III of the Constitution, and it confines the persons who may bring suit to those whom Congress intended to provide the remedy invoked in a particular controversy. Appellants do not have standing because they are outside the class to whom Congress intended to extend the right to bring federal damage actions when it enacted section 10(b).

Congress could have preempted state law controlling deceptive practices in the marketing of these securities, and it could have given anyone injured by the practices condemned by section 10(b) a private federal damage remedy. It did neither. Instead, Congress created a scheme of private and public remedies superimposed upon state statutory and common law remedies. When confronted with a complex legislative scheme of this kind, the judiciary must be extremely careful not to upset the balances built into the scheme by lightly implying federal remedies or by diluting principles of standing. *(Cf. SEC*

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[7]The Supreme Court has described the law of standing as a "complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations." United States *ex rel.* Chapman v. Federal Power Comm'n (1953) 345 U.S. 153, 156.

v. National Securities, Inc. (1969) 393 U.S. 453, 465, 467 n.9; *Holloway v. Bristol-Myers Corp.* (D.C. Cir. 1973) ..... F.2d .....)

An expansive definition of the class given standing to pursue section 10(b) damage actions promises some incremental benefit in preventing deceptive practices in the marketing of securities, one of the principal purposes of the section. Expanding the class, however, entails costs as well as benefits. Incautious loosening of the purchaser-seller rule will generate federal litigation, increase the cost of marketing securities,[8] inject into securities marketing new risk factors that defy accurate assessment, expose offerors to draconian damage claims, and invite strike suits.[9] Securities markets are complex and sensitive institutions. Opening the valve, even a little, that controls the flow of section 10(b) damage actions can so far unsettle the market as to defeat, rather than to promote, the benevolent purposes of Congress in enacting

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[8]Under the majority's rule, securities traders would not only have to insure against potentially crippling damages, they would also have to bear increased compliance costs. The accuracy of a representation with regard to a security is usually judged by hindsight; if the price of the security rises substantially, prior representations may seem unduly conservative; if it falls, too optimistic. Under the purchaser-seller rule, offerors can protect themselves against unforseen impositions of liability by acting with judicious restraint when dealing with others; they need merely avoid inaccuracies that induce others to act. If passive "investors" were also allowed to sue, such self-protective conservatism might prove suicidal, for an offeror would have to be micrometrically accurate. If securities traders are to be held responsible for lapses in such exactitude, the costs of accumulating, verifying, and presenting the necessary data would soar.

[9]The great ease with which plaintiffs can allege the requirements for the majority's standing rule and the greater difficulty that plaintiffs are going to have proving the allegations suggests that the majority's rule will allow a relatively high proportion of "bad" cases into court. The risk of strike suits is particularly high in such cases; although they are difficult to prove at trial, they are even more difficult to dispose of before trial.

the statute. *(Cf. Herpich v. Wallace* (5th Cir. 1970) 430 F.2d 792, 804.)

The purchaser-seller rule has maintained the balances built into the congressional scheme by permitting damage actions to be brought only by those persons whose active participation in the marketing transaction promises enforcement of the statute without undue risk of abuse of the litigation process and without distorting the securities market.

The majority implies that its exception to the purchaser-seller rule does no real harm because few litigants will be situated exactly as were these appellants. In my view, the majority underestimates the ingenuity of counsel, but, even if it did not, the position is jurisprudentially unsound because it does not create neutral principles of law. In drawing the standing line between deceived nonbuyers given closed-end opportunities to purchase securities pursuant to a consent decree (appellants) and deceived nonbuyers given opportunities to purchase securities on a while-they-last basis pursuant to the same consent decree (nonbuyer public investors), the majority has not supplied a rationale keyed to the statute and rule to support its conclusion.[10] Without such an underlying rationale, there are no neutral principles preventing the majority's "causation and damages" or "functional equivalence" terminology from being extended to all passive "investors".

To expand standing to nonsellers or to nonbuyers, like appellants, who have taken no affirmative action of any

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[10]The majority opinion would allow standing to sue if the misled non-buyer were one of 10 offerees who could buy no more than 10,000 shares each of a 100,000-share offering, but it would deny standing if the non-buyer were identically misled as to the same shares, but he was one of 11 offerees of 10,000 shares of the same offering to be sold on while-they-last terms. Why?

kind in reliance upon alleged deceptive statements invites litigation that has nothing to do with protecting the integrity of the marketing of securities. The passive investor could always await market developments without any risk, claiming deception caused nonbuying if the value of the securities proved more promising than the offerors' glum predictions and deception caused nonselling if a rosier prospectus was followed by a market decline. Meanwhile, securities offerors would be hard pressed to find language for prospectuses that would be sufficiently neutral to avoid potential damage suits from bystanders.

I would affirm.

Appendix B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MANOR DRUG STORES AND ALL OTHER USERS OF BLUE CHIP STAMPS WHO WERE ENTITLED BUT FAILED TO PURCHASE STOCK OF BLUE CHIP STAMPS, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

BLUE CHIP STAMPS, a corporation, BLUE CHIP STAMP COMPANY, a merged corporation, LUCKY STORES, INC., MARKET BASKET, a corporation, PURITY STORES, INC., RALPHS GROCERY COMPANY, a corporation, SAFEWAY STORES, INC., THRIFTIMART, INC., THRIFTY DRUG STORES CO., INC., VONS GROCERY CO., a corporation, ROBERT E. ALEXANDER, DONALD A. KOEPPEL, LEONARD H. STRAUS, WILLIAM F. RAMSEY, ROBERT E. LAVERTY, RICHARD RALPHS, JOHN R. NIVEN, FRED VON DER AHE,

Defendants-Appellees.

No. 71-2223
ORDER

[Filed April 1, 1974]

Before: BROWNING, HUFSTEDLER, and CHOY, Circuit Judges

The majority opinion filed herein October 15, 1973, is modified as follows:

(1) The first sentence, first paragraph, slip opinion page [A-10], now reads:

Under the allegations of this complaint, the consent decree involved here serves the same function as did the contractual relationship referred to in *Mount Clemens.*

(2) The following new paragraph has been added prior to the concluding "disposition" line, slip opinion page [A-11]:

This holding does not undermine *Mount Clemens.* The allegations of the present complaint describe a highly unusual situation in which an unyielding insistence upon the existence of a contract to purchase as a prerequisite to relief would subordinate substance to form.

To meet the modifications in the language of the majority opinion, Judge Hufstedler makes the following changes in the dissenting opinion:

(1) From the first paragraph of the dissent, third sentence (slip opinion page [A-11]), delete the quote marks and strike the word "functionally."

(2) In the first full paragraph (slip opinion page [A-13]) line [3], change "is the 'functional equivalent of" to "serves the same function as did." Delete the quote mark at line 4.

(3) From the [second] paragraph (slip opinion page [A-13]), strike from the second line the word "equivalent" and substitute therefor the words "the same".

(4) At line [6] (slip opinion page [A-15]) change "'functional equivalence'" to "'same function' conclusion."

(5) From the first full paragraph (slip opinion page [A-15]), second sentence, change "The 'functional equivalent' language" to "To state that the consent decree serves the same function as a contract".

(6) In the [second] full paragraph (slip opinion page [A-21]), penultimate line, change "'functional equivalence'" to "'same function'".

The petition for rehearing is denied.

A majority of the court having voted to reject the suggestion for rehearing in banc, the suggestion is rejected.

Judges Koelsch, Ely, Hufstedler, Trask, and Wallace have requested that it be recited that they voted to rehear the case in banc.

Appendix C

MANOR DRUG STORES, etc., Plaintiff,

v.

BLUE CHIP STAMPS, a corporation, et al., Defendants.

No. 70-2539.

United States District Court,
C. D. California.
[May 25, 1971]

OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

KELLEHER, District Judge.

Plaintiff brought this action for actual and exemplary damages as a result of defendants' alleged misleading representations in connection with the offer of certain securities of a corporation reorganized pursuant to a consent decree and final judgment entered by this Court in United States v. Blue Chip Stamp Co. (C.D.Calif., June 5, 1967) Civil No. 63-1552-F, an action arising under the antitrust laws against Blue Chip Stamp Co. (hereafter old Blue Chip) and nine of its shareholder corporations, named defendants herein along with certain directors of old Blue Chip and Blue Chip Stamps, a corporation, (hereafter new Blue Chip).

The consent decree provided in section V:

> Blue Chip is ordered and directed to present to the Court . . . a plan for the reorganization of Blue Chip Stamp Company . . . Upon approval of the plan by the Court shall make bona fide and diligent efforts to reorganize the company pursuant to the said plan;

and in section VII further provided:

> In the event that Section V becomes inapplicable, Blue Chip may also enter into a reorganization pursuant to a plan for the reorganization of Blue Chip Stamp Company acceptable to the Court.

The reorganization plan adopted by the Court provided, inter alia, for the formation of new Blue Chip and ordered that an:

> . . . offering of approximately 621,600 shares of its Common Stock will then be made by New Company to users of Blue Chip Stamps (who issue stamps to their retail customers as a reward for patronage) other than users who are also shareholders of Blue Chip (such users to whom such offering is made are hereinafter referred to as "Users") on a pro rata basis determined by the quantity of stamp pads issued to Users during the period subsequent to March 1, 1964, and prior to a date to be determined which will be not more than 90 days prior to the effective date of the registration statement hereinafter referred to.

The reorganization plan then went on to require registration of the offering under the Securities Act of 1933 and further prescribed that in the event portions of the offering went unsubscribed at the termination of the offering, the unsubscribed shares were to be disposed of by appropriate action of the directors of new Blue Chip. Thereafter, according to the amended complaint, an offering of new Blue Chip "units," consisting of a $100 principal amount debenture and three shares of new Blue Chip Common at a total cash consideration of $101.00, were tendered to the users by means of a prospectus dated August 29, 1968; the offering required the users to exercise their rights on or before November 29, 1968. Plaintiff alleges that the Court intended the offering to be a bargain for the users in compensation for the damages they

allegedly suffered as a result of old Blue Chip's antitrust violations. However, the offering shareholders purportedly had no intention of complying in good faith with the terms of the consent decree and permitting the users to exercise their rights under the offer and accordingly conspired to dissuade the users from purchasing the units by including misleading statements in the prospectus; specifically, the amended complaint alleges that the prospectus stated new Blue Chip's income and net earnings would be adversely affected by payment of certain claims against the company and by a substantial decrease in the use of the firm's trading stamp service. As a result of these alleged misrepresentations, plaintiff asserts that it and the other users it claims to represent were induced not to purchase the tendered units and, thereby, suffered damages which it seeks to recover by this action.

Plaintiff contends that the offering shareholders' and directors' alleged misrepresentations violate section 12 of the Securities Act of 1933 [15 U.S.C. § 77*l*] and section 10(b) of the Securities & Exchange Act of 1934 [15 U.S.C. § 78j(b)] and Securities & Exchange Commission Rule 10b-5, promulgated thereunder. A fourth cause of action asserted under pendent federal jurisdiction alleges that plaintiff is a third party beneficiary under the consent decree and that the offering shareholders' and directors' actions breached their duty to plaintiff who may recover therefor. Defendants have moved to dismiss the amended complaint as failing to state a cognizable federal claim; for purposes of these motions, of course, the Court will take the allegations of the amended complaint as true.

PLAINTIFF'S CLAIM TO BENEFICIARY STATUS

[1] Plaintiff claims that the consent decree of June 5, 1967, sought to redress old Blue Chip's alleged antitrust

violations by affording non-shareholders of old Blue Chip's trading stamp service, such as plaintiff, the opportunity to become shareholders in a newly organized Blue Chip company at what plaintiff describes as a "bargain basement price." Since the Court intended to benefit plaintiff and other non-shareholder users, plaintiff infers that the offering shareholders owed plaintiff a duty which was breached by the alleged misrepresentations for which plaintiff may recover in Federal Court. Plaintiff's argument is as unmeritorious as it is imaginative.

[2, 3] It appears well established that a non-party to an antitrust decree cannot attempt to enforce the decree against the defendant, even though the decree was intended to directly or indirectly benefit the non-party. Accordingly, a non-party does not have standing to punish a defendant for contempt of a decree entered in an antitrust action by the United States which retains the opportunity to enforce or modify the terms of the decree. United States v. American Soc. of Composers, Auth. & Pub., 341 F.2d 1003, 1008 (2d Cir. 1965), cert. denied, 382 U.S. 877, 86 S.Ct. 160, 15 L. Ed.2d 119 (1965). The fact that the decree was intended to benefit certain non-parties does not confer on them an independent cause of action for violations of the decree. Control Data Corp. v. International Bus. Mach. Corp., 306 F.Supp. 839 (D.Minn. 1969), aff'd 430 F.2d 1277, 1278 (8th Cir. 1970). In *Control Data,* plaintiffs were barred from asserting defendants' alleged violations of two prior consent decrees even though plaintiffs did not per se seek to enforce the provisions of the earlier decrees and even though the decrees clearly intended to benefit defendants' competitors, including plaintiffs. The District Court reasoned that to permit private third parties to assert consent decree violations against antitrust defendants would considerably diminish their incentive to enter into such

decrees as well as hinder the Government's ability to obtain consent decrees in appropriate cases. Control Data Corp. v. International Bus. Mach., *supra*, at 846.

Plaintiff's attempt to distinguish the *Control Data* case by the fact that not all plaintiffs in *Control Data* were in existence at the time of the decrees therein is untenable since the very purpose of the decree was to stimulate competition, including the formation of new firms, in the relevant industry. Moreover, even though *Control Data* involved a private antitrust claim by the third party, there appears to be no reason why the rule of that case should not apply with equal, if not greater, force where the plaintiff, as herein, pleads a non-antitrust cause of action which depends on the prior decree. The Court concludes that if plaintiff is to have any action for defendants' alleged misrepresentations, its claim must stand or fall on the provisions of the securities law which it asserts defendants have violated.

'33 ACT, SECTION 12

[4] Section 12 of the Securities Act of 1933 provides that any person who fraudulently sells a security in interstate commerce or through the use of the mails ". . . shall be liable to the person purchasing such security. . . ." See Greater Iowa Corp. v. McLendon, 378 F.2d 783, 789, 790 (8th Cir. 1967), affirming the dismissal of an issuer's complaint attacking the validity of minority shareholders' voting trust and stating that § 12(2) was not designed to afford protection to persons who are not investors nor those not in privity with them. Slack v. Stiner, 358 F.2d 65 (5th Cir. 1966). Slavin v. Germantown Ins. Co., 174 F.2d 799 (3d Cir. 1949), rev'g on other grounds 74 F.Supp. 876 (E.D.Pa.1947). Since this section of the Act expressly limits recovery to private litigants

who qualify as "purchasers," it clearly has no application to the present action where the gravamen of the amended complaint is that due to defendants' alleged fraud plaintiff was induced not to purchase the offered securities.

'34 ACT, SECTION 10 AND RULE 10b-5

[5] Section 10 of the '34 Act makes unlawful the use of ". . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities & Exchange] Commission may prescribe. . . ." Thereunder, the Commission has promulgated Rule 10b-5, which provides:

> It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange.
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, *in connection with the purchase or sale of any security.* (emphasis added) [17 C.F.R. § 240.10b-5]

Both parties state that the Ninth Circuit Court of Appeals has not had occasion to rule whether an offeree, such as plaintiff, who has not in fact purchased or sold securities as a result of conduct fraudulent within the

meaning of the Rule, may recover damages in a private civil action. There has, however, been considerable discussion of the problem elsewhere.

The watershed case appears to be Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1952), cert. denied, 343 U.S. 956, 72 S.Ct. 1051, 96 L.Ed. 1356 (1952), holding that Rule 10b-5 does not sanction private recovery by a minority shareholder who complained of an insider's sale of corporate control without affording the minority shareholders an opportunity to sell their shares at the same price. However, to fully effectuate the purpose of the Rule, the *Birnbaum* decision has generally been given a fairly restrictive interpretation by limiting its application to situations where the plaintiff was not a party to a purchase or sale transaction. See the dissent of Frank, J., in Joseph v. Farnsworth Radio & Television Corp., 198 F.2d 883 (2d Cir. 1952). Indeed, the exceptions or limitations to an across the board application of the *Birnbaum* doctrine are legion, usually resting upon a liberal construction of what constitutes a purchase or sale for purposes of Rule 10b-5; thus, for example, where defrauded sellers are induced or forced to postpone their sale, an action under Rule 10b-5 will lie, Stockwell v. Reynolds & Co., 252 F.Supp. 215 (S.D.N.Y. 1965), Opper v. Hancock Securities Corp., 250 F.Supp. 668 (S.D.N.Y.1966), aff'd 367 F.2d 157 (2d Cir. 1966); a minority shareholder was deemed a forced seller for purposes of Rule 10b-5 even though he had neither accepted defendant's tender offer nor surrendered his stock pursuant to a "short form" merger, Vine v. Beneficial Finance Co., Inc., 374 F.2d 627 (2d Cir. 1967), cert. denied, 389 U.S. 970, 88 S.Ct. 463, 19 L.Ed.2d 460 (1967); nor does it appear a consummated purchase or sale is required to invoke operation of the Rule, Commerce Reporting Co. v. Puretec, Inc., 290 F.Supp. 715, 718 (S.D.N.Y. 1965). Without question, such

broad interpretations of the Rule are both sound and necessary in order to vitalize the antifraud purposes of the Rule and the securities laws. S.E.C. v. National Securities, Inc., 393 U.S. 453, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969).

Nonetheless, the Court considers the Rule's application properly limited to situations where the defrauded party can show actual damages, not merely the loss of a possible gain contingent upon factors which never came into existence. 15 U.S.C. § 78bb(a). Plaintiff's case aptly demonstrates the soundness of so limiting operation of the Rule; the causal nexus between defendants' alleged misrepresentations and plaintiff's failure to purchase the Blue Chip "units" depends upon a number of highly uncertain factors such as proof that but for defendants' misrepresentations plaintiff would have, indeed, purchased the offered "units;" the Court doubts that plaintiff, if permitted to maintain this action, could satisfactorily carry the burden of such proof; in view of this uncertainty, damages herein appear highly speculative. Kremer v. Selheimer, 215 F.Supp. 549, 552, 553 (E.D.Pa. 1963). This uncertainty is not, it is believed, peculiar to plaintiff's case but applies to any party who, like plaintiff, has not in fact entered into a transaction having the effect of a purchase or sale of securities; since the securities laws do not sanction recovery for losses based on speculation or conjecture, the Court concludes that a party in plaintiff's position is not entitled to an action under these laws.

None of the numerous cases cited by plaintiff persuades the Court that the *Birnbaum* requirement of a purchase or sale has been discarded as an essential element for maintenance of an action under Rule 10b-5. Despite some fairly extensive criticism of the requirement and predic-

tions of its pending "demise," Entel v. Allen, 270 F.Supp. 60 (S.D.N.Y.1967), Lowenfals, "The Demise of the Birnbaum Doctrine: A New Era for Rule 10b-5," 54 Va.L.Rev. 268 (1968), the Court finds ample authority that the *Birnbaum* requirement retains validity and represents sound policy. Iroquois Industries, Inc. v. Syracuse China Corp., 417 F.2d 963, 967 (2d Cir. 1969), cert. denied, 399 U.S. 909, 90 S.Ct. 2199, 26 L.Ed.2d 561 (1970). Greenstein v. Paul, 400 F.2d 580, 581 (2d Cir. 1968). 3 Loss, Securities Regulation (2d ed. 1961) 1469. 6 Loss, Securities Regulation (Supplement 1969) 3620.

Upon the foregoing, it is hereby ordered that defendants' motions to dismiss are granted and the amended complaint is dismissed with prejudice.

Appendix D

15 U.S.C. §77k

§77k. Civil liabilities on account of false registration statement.

(a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue —

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Notwithstanding the provisions of subsection (a) of this section no person, *other than the issuer,* shall be liable as provided therein who shall sustain the burden of proof —

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and ....

* * *

(e) The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided,* That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall

any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(g) In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

(Emphasis added.)

Appendix E

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[Filed January 27, 1971]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Manor Drug Stores and all other users of Blue Chip Stamps who were entitled but failed to purchase stock of Blue Chip Stamps, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

vs.

Blue Chip Stamps, a corporation, Blue Chip Stamp Company, a merged corporation, Lucky Stores, Inc., Market Basket, a corporation, Purity Stores, Inc., Ralphs Grocery Company, a corporation, Safeway Stores, Inc., Thriftimart, Inc., Thrifty Drug Stores Co., Inc., Vons Grocery Co., a corporation, Robert E. Alexander, Donald A. Koeppel, Leonard H. Straus, William F. Ramsey, Robert E. Laverty, Richard Ralphs, John R. Niven, Fred von der Ahe,

Defendants.

CIVIL NO. 70-2539-RJK

Amended Complaint for Breach of Contract, Fraud and Misrepresentation

JURY TRIAL REQUESTED

FIRST CAUSE

I

This action is instituted under the Securities Act of 1933 (15 U.S.C. §§ 77a, *et seq.*); under the Securities Exchange Act of 1934 (15 U.S.C. §§ 77a, *et seq.*); under § 10 of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and Rule 10b-5 adopted thereunder; under § 12 of the Securities Act of 1933; and jurisdiction is founded on the Securities Act of 1933 (particularly, without limitation, § 22 thereof [15 U.S.C. § 77v]) and the Securities Exchange Act of 1934 (particularly, without limitation, § 27 thereof [15 U.S.C. § 78aa]); and jurisdiction is founded on the doctrine of pendent jurisdiction as to causes arising out of state law.

II

Plantiff is a corporation duly organized and existing under the laws of the State of California, with its principal place of business in the State of California, and brings this action in its own behalf and as a class action on behalf of others similarly situated in accordance with the provisions of Rule 23 of the Federal Rules of Civil Procedure for the United States District Courts.

III

The persons who constitute the class are so numerous that joinder of all members is impracticable; there are questions of law and fact common to the entire class; the claims of plaintiff are typical of the claims of the entire class and each member thereof; and the plaintiff will thoroughly and adequately protect the interests of the entire class and each member thereof.

IV

Defendants, ALEXANDER'S MARKETS, LUCKY STORES, INC., RALPHS GROCERY COMPANY, THRIFTIMART, INC., MARKET BASKET, and THRIFTY DRUG STORES CO., INC., are corporations, each of which has been organized and is existing under the laws of the State of California; defendant, PURITY STORES, INC., is a corporation organized and existing under the laws of the State of Nevada and is authorized to do business and is doing business in the State of California; defendant, SAFEWAY STORES, INC., is a corporation organized and existing under the laws of the State of Maryland and is authorized to do business and is doing business in the State of California; defendant, VONS GROCERY COMPANY, is a corporation organized and existing under the laws of the State of Delaware and is authorized to do business and is doing business in the State of California. Each of said defendants maintains its principal place of business in the County of Los Angeles, State of California, with the exception of LUCKY STORES, INC., which has its principal place of business in the County of Alameda, State of California, PURITY STORES, INC., which has its principal place of business in the County of San Mateo, State of California, and SAFEWAY STORES, INC., which has its principal place of business in the County of Alameda, State of California.

The said corporate defendants listed in this Paragraph IV were stockholders of BLUE CHIP STAMPS at the time of the offering hereinafter described and owned approximately ninety percent (90%) of its stock at said time.

V

Defendants, ROBERT E. ALEXANDER, DONALD A. KOEPPEL, FRED VON DER AHE, LEONARD H. STRAUS, DRUMMOND WILDE, WILLIAM H. DYER, JR., ROBERT E. LAVERTY, WILLIAM F. RAMSEY, and RICHARD RALPHS, are now and were at all times from the time of its incorporation in about July 1968, members of the Board of Directors of BLUE CHIP STAMPS. At all of said times defendant, ROBERT E. ALEXANDER, represented the interests of defendant, ALEXANDER MARKETS, on said board; defendant, FRED VON DER AHE, represented the interests of defendant, VONS GROCERY CO., on said board; defendant, LEONARD H. STRAUS, represented the interests of defendant, THRIFTY DRUG STORES CO., INC., on said board; defendant, DRUMMOND WILDE, represented the interests of defendant, SAFEWAY STORES, INC., on said board; defendant, WILLIAM H. DYER, JR., represented the interests of defendant, LUCKY STORES, INC., on said board; defendant, ROBERT E. LAVERTY, represented the interests of defendant, THRIFTIMART, INC., on said board; defendant, RICHARD RALPHS, represented the interests of defendant, RALPHS GROCERY COMPANY, on said board; and defendant, JOHN R. NIVEN, represented the interests of defendant, PURITY STORES, INC., on said board.

VI

In connection with and in furtherance of and as an integral part of the illegal and fraudulent scheme herein alleged, defendants directly and indirectly, by the use of the means and instrumentalities of transportation and communication in interstate commerce and by the use of

the mails, engaged in acts, practices, courses of business and manipulative and deceptive devices, all constituting and operating as a fraud and deceit upon the plaintiffs as untrue and misleading statements of material facts and omission of material facts, which were intended to, and did, defraud plaintiffs.

In December, 1963, the United States of America, as plaintiff, filed in the United States District Court, Central Division of California, an action against Blue Chip Stamp Co. and nine of its twelve stockholders, including all of the corporations named as defendants herein except the defendant, Blue Chip Stamps, which was not then in existence, charging violations under the Sherman Anti-Trust Act, said action being entitled United States of America, plaintiff vs. Blue Chip Stamp Co., et al., defendants, bearing civil action No. 63-1552-F, which action is sometimes hereinafter referred to as the "Government Case."

As a result of said action, a Consent Final Judgment (sometimes herein referred to as "Consent Decree") was made and entered by the United States District Court on or about June 5, 1967, which, among other things, provided that the defendant corporations present to the Court for its approval a plan for the reorganization of Blue Chip Stamp Co. A true copy of said Consent Decree is attached hereto as Exhibit "A" hereof and incorporated herein.

Pursuant to said Consent Decree, said defendant corporation submitted to the Court a plan of reorganization of Blue Chip Stamp Co., which plan was thereafter approved by said Court and incorporated into said Final Consent Decree. A true copy of said plan of reorganization and order approving said plan is attached hereto with certain conditions as Exhibit "B" hereof and incor-

porated herein, and is sometimes hereinafter referred to as "The Plan."

The Plan required among other things the formation of a "new company," which was later named BLUE CHIP STAMPS, one of the defendants herein, and required the merger of defendant Blue Chip Stamp Co. into said BLUE CHIP STAMPS.

VII

Among the provisions of The Plan was the following:

"An offering of approximately 621,600 shares of its common stock would then be made by New Company (defendant BLUE CHIP STAMPS) to users of BLUE CHIP STAMPS (who issue stamps to their retail customers as a reward for patronage) other than users who are also shareholders of BLUE CHIP (such users to whom such offering is to be made are hereinafter referred to as "Users") on a pro rata basis determined by the quantity of stamp pads issued to Users during the period subsequent to March 1, 1964, and prior to a date to be determined which will be not more than ninety (90) days prior to the effective date of registration statement hereinafter referred to. The offering will be made in units consisting of three (3) shares of the common stock of New Company (defendant BLUE CHIP STAMPS) and one (1) One Hundred Dollars ($100.00) principal amount debenture for a cash consideration of One Hundred One Dollars ($101.00)."

VIII

Said Consent Decree further provided that in the event all of said 621,600 shares were not purchased by the Users the defendant, BLUE CHIP STAMPS, would be per-

mitted to sell the shares not so purchased at the then reasonable market value of said shares.

The above provisions of The Plan were included for the purpose of complying with the Court's direction that the defendants divest themselves of a total of about fifty-five percent (55%) of their holdings in the reorganization of the defendant, BLUE CHIP STAMP COMPANY, by its merger into BLUE CHIP STAMPS.

IX

Among the parties appearing in said Government case were the Attorney General of the State of California in behalf of Users other than Users who were also stockholders of BLUE CHIP STAMP COMPANY, and several users individually and in trade association.

All of said Users in this paragraph contended before the Court that they, in fact, owned an interest in the defendant, BLUE CHIP STAMP COMPANY, and the Twenty Million Dollars ($20,000,000) in profits it had accumulated during the five (5) years immediately prior thereto, and that in any decision of the said government case, the ownership of said users of an interest in the said defendant, BLUE CHIP STAMP COMPANY, and BLUE CHIP STAMPS should be decreed.

X

The claims and contentions by and on behalf of the users, as aforesaid, prompted the provisions of The Plan and the offering of three (3) shares of common stock and one (1) One Hundred Dollars ($100.00) principal amount debenture (hereinafter sometimes referred to as a "Unit") to the users for a cash consideration of One Hundred One Dollars ($101.00) which offering was a bargain, was in-

tended by the Court in the government case as a bargain, was recognized by the defendants herein as a bargain, and was intended by the United States of America, as plaintiff in the Government case and was, in fact, a bargain. It was the purpose and intent of the said Consent Decree and The Plan that the Users as described therein would benefit from the bargain purchase provided in the said Court Decree and Plan.

XI

The reasonable market value of the said Units at the time of the offering that was made pursuant to The Plan was, and still is, at least Three Hundred Fifteen Dollars ($315.00), of which Seventy-Five Dollars ($75.00) represented the reasonable market value of one (1) debenture and Eighty Dollars ($80.00) the reasonable market value of one (1) share of stock. The net bargain provided by said offering was, therefore, approximately $71.33 per share or $214.00 per unit.

XII

In compliance with said Consent Decree and The Plan, the defendant, BLUE CHIP STAMPS ("New Company") was formed in about July, 1968, and issued 621,000 [sic.] shares of stock to the stockholders of BLUE CHIP STAMPS COMPANY (of which approximately 560,000 shares went to the defendants herein); 27,600 shares were reserved for offering to certain of its employees; 10,400 shares were reserved for issuance pursuant to its qualified Stock Option Plan; and an additional 621,000 [sic.] shares were earmarked for offering to the Users of Blue Chip Stamps, including plaintiffs, pursuant to The Plan as set forth above.

Under the said Consent Decree and The Plan plaintiffs, as Users, were entitled to purchase approximately 100,000 Units or 300,000 shares of the 621,600 shares of defendant, BLUE CHIP STAMPS. Said units, as hereinabove alleged, in fact, being offered at One Hundred One Dollars ($101.00) each when they were worth, and known by the defendants to be worth, Three Hundred Fifteen Dollars ($315.00) per unit.

Under the said Consent Decree and The Plan, all of the members of the class suing herein, who failed to purchase said Units by reason of the facts set forth herein, were entitled to purchase the said 100,000 Units. That by not purchasing said Units at said price of One Hundred One Dollars ($101.00) per Unit, they were damaged in the amount of Twenty-One Million Four Hundred Thousand Dollars ($21,400,000.00).

XIII

As part of and pursuant to the said Consent Decree and The Plan, the defendants used the mails and other instrumentalities of inter-state commerce and caused defendant, BLUE CHIP STAMPS, to make the offering described above to the Users, including plaintiffs, of securities in Units described above through a certain Prospectus dated August 29, 1968 (hereinafter sometimes referred to as the Negative Prospectus), prepared and transmitted through the United States mail and other instrumentalities of inter-state commerce by the defendants in the name of the defendant, BLUE CHIP STAMPS. A true copy of said Prospectus is annexed hereto as Exhibit "C" and made a part hereof. Said Negative Prospectus and accompanying documents required the Users, including plaintiffs, to exercise their rights on or before November 29, 1968. At no time after said offering and neither before

nor after November 29, 1968, did defendants disclose to plaintiffs the true facts with respect to the value of said securities as herein set forth.

XIV

Defendants and each of them desired that the Users fail to exercise their rights under said Consent Decree, Plan and Prospectus to purchase the shares to which they were entitled, and, pursuant to said desire, said defendants, and each of them, conspired among themselves to accomplish said purpose, and said defendants, and each of them, did accomplish said purpose, by preparing and using said Prospectus as a manipulative and deceptive device and contrivance calculated to mislead and dissuade users not knowledgeable of the true value of said shares from purchasing said shares. That said Prospectus was employed as a device, scheme, and artifice to defraud the users, and said defendants, and each of them, were thereby engaged in an act, practice and course of business which operated and was intended to operate as a fraud and deceit upon the users in connection with the purchase of said shares. More specifically, said Prospectus, prepared as aforesaid, provided in part as follows:

(a) Commencing on page one in the fifth line thereof, defendants called attention to five "Items of Special Interests" appearing on page 2, all of which were negative and designed to mislead the Users, including plaintiff, as to the true value of the stock and thereby to dissuade them from purchasing, as hereafter set forth. Said "Items of Special Interests" were as follows:

"Prospective purchasers of securities offered herein shall particularly note the following items, each of which will be or may be adverse and which is discussed later in this Prospectus in greater detail:

(1) Net income from the current fiscal year will be adversely affected by payments aggregating Seven Million Nine Hundred Twenty-Eight Thousand ($7,928,000.00) Dollars made since March 2, 1968, in settlement of claims against the Company (See "Statement of Income and Retained Earnings" and "Litigation").

(2) Net income would be adversely affected by a substantial decrease in the use of Company's trading stamp service (See "Business — General").

(3) Net income would be adversely affected by a sale of one-third of the Company's trading stamp business in California; approximately ninety-nine percent (99%) of the Company's stamp service income is derived from its operations in California (See "Business — Effects of Consent Decree on Company's Operations").

(4) Claims or Causes of Action (as defined) against the Company, including prayers for treble damages, now aggregate approximately $29,000,000. The Company has agreed to indemnify Blue Chip Stamp Company and the present and former officers, directors and stockholders of the Company or Blue Chip Stamp Company from any liability or expenses arising out of certain claims asserted against any of them (See "Litigation").

(5) All but two of the present directors are precluded until June 5, 1977, from serving as directors after the first meeting of the Company's stockholders following the offer herein so long as they are employed by specified companies (See "Management").

Said five "Items of Special Interest" were thereafter referred to individually or collectively approximately

fifteen (15) times. Constant reference to said items was intended to, and did cause plaintiffs to be misled as to the true value of said shares. When the defendants themselves did, one year later, offer their own shares to the public at Ninety Dollars ($90.00) per share (allowing for a five-to-two stock split in the interim) by a Prospectus, a copy of which is attached hereto as Exhibit "D" and made a part hereof by reference (hereinafter referred to as "The Positive Prospectus"), no negative "Items of Special Interest" were set forth, nor was there reference to such items, although (to the extent they were relevant at the time of the Negative Prospectus) they were relevant at the time of the Positive Prospectus.

(b) Commencing in the second paragraph on page one of the Negative Prospectus there was reference to "Claims or Causes of Action" against the defendant, BLUE CHIP STAMPS, in the amount of Twenty-Nine Million Dollars ($29,000,000) and reference to said "Claims or Causes of Action" was thereafter repeatedly and unnecessarily made. Such constant reference to said claims was made with the intention to, and it did, cause the plaintiffs to be misled as to the true value of said shares. The Twenty-Nine Million Dollars ($29,000,000) amount of said claims was repeated and emphasized in said Negative Prospectus. Defendants knew that said claims were in fact of insignificant merit and were settled shortly after November 29, 1968, for less than One Million Dollars ($1,000,000.00).

(c) The "Litigation" section of the Negative Prospectus devotes three (3) printed pages to a recount of suits already settled with emphasis on the size of the claims, complexity of the matters, and a de-emphasis of the fact that they had already been settled. The Positive Prospectus one year later refers to none of these

cases by name and covers all of the settlements in two sentences.

(d) No underwriters were employed, no salesmen were used, and the offering was quietly accomplished by one mailing or hand delivery (unless the user filled out an information form requiring time and effort), and one newspaper advertisement in several California newspapers. Plaintiffs had no information as to the number of shares to which they were entitled unless they assembled data for defendants. However, defendants knew or should have known the number of shares each plaintiff was eligible to receive, but failed to disclose this information to plaintiffs.

(e) Plaintiffs were required to purchase their shares on or before November 29, 1968, or lose their rights.

(f) No information concerning the value of the stock was ever supplied to the plaintiffs by defendants except that set forth in the Negative Prospectus.

(g) The Negative Prospectus on Page 10 emphasized the possibility of losing customers and the obvious fact that defendant, BLUE CHIP STAMPS, had no assurance of continued patronage of its customers. The Negative Prospectus de-emphasized the fact that BLUE CHIP STAMPS' patronage undoubtedly would increase because it had been prohibited by the Consent Decree from preventing customers from giving extra stamps as a premium. BLUE CHIP STAMPS' business and profits did, in fact, increase substantially since the date of the Negative Prospectus.

(h) The Negative Prospectus on Page 12 states that the company estimates that Ninety-seven and one-half per cent (97½%) of all stamps issued will be redeemed. In fact, less than ninety per cent (90%) of all stamps

historically are redeemed. Based upon its sales of Ninety Million Dollars ($90,000,000.00) per year, or more, this misrepresentation resulted in an understatement of earnings on stamp sales for the year prior to the offering of Six Million Dollars ($6,000,000) or about eighty per cent (80%).

(i) The Negative Prospectus referred in several places to certain allegedly disadvantageous provisions of the Consent Decree or Plan in a negative manner designed to dissuade Users from exercising their rights under the said offering, and said Prospectus concealed from the Users, including plaintiffs, the fact that said Consent Decree would be highly beneficial to BLUE CHIP STAMPS in that its provisions were certain to, and did, force practically all competitors out of the State of California and that BLUE CHIP STAMPS and buyers of its Units would accordingly benefit thereby.

XV

The entire offering, as set forth in the Negative Prospectus, including but not limited to the provisions in said offering, as set forth in subparagraphs (a), (b), (c), (g), (h) and (i) of the last preceding paragraph of this pleading, resulted in the misrepresentation of material facts and the withholding of material information and was seriously misleading and was intended by defendants to be misleading in the light of all of the facts. The said offering did, in fact, mislead the plaintiffs in that they did not realize the real value of the Units being offered to them.

XVI

Relying upon said representations contained in the Prospectus, the plaintiffs, and each of them, were induced and did, in fact, not accept said offer and purchase said Units. Over 60% of the Users who purchased said Units had information outside and independent of said Negative Prospectus.

XVII

Under the said Consent Decree and The Plan, all of the members of the class suing herein, who failed to purchase said Units by reason of the facts set forth herein, were entitled to purchase the said Three Hundred Thousand (300,000) shares; that by not purchasing said shares at said price of Eight Dollars and Sixty-Seven Cents ($8.67) per share, they were damaged in the amount of Twenty-One Million Four Hundred Thousand Dollars ($21,400,000).

XVIII

Each of the defendants deliberately acted as hereinabove alleged for the purpose of benefiting themselves at the expense and to the damage of plaintiffs and each of them, and were thereby guilty of oppression, fraud and malice, whereby plaintiffs, and each of them, in addition to the actual damages hereinabove alleged, should recover damages for the sake of example and by way of punishing the defendants, and each of them.

SECOND CAUSE

I

Plaintiffs repeat and reallege each and all of the allegations of the First Cause with the same force and effect as if the same were here set forth in full.

II

The aforesaid misleading and false representations were made by defendants with the intent to induce plaintiffs to refrain from purchasing said offered shares of New Company in order that defendants would materially benefit from such failure of purchase on the part of prospective purchasers.

III

The aforesaid representations made by defendants were, at the time they were made and subsequent thereto, known to the defendants to be false and misleading.

IV

Plaintiffs, and each of them, at the time said representations were made and subsequent thereto, were ignorant of their false and misleading nature and believed them to be true and accurate. In reasonable reliance thereon, plaintiffs were induced to and did in fact refrain from accepting said offer; had plaintiffs known the true facts they would have accepted said offer and benefited from said "bargain sale."

V

By reason of said false and misleading representations by the defendants, and plaintiffs' reliance thereon, plaintiffs have been damaged in the amount of $21,400,000.

THIRD CAUSE

I

Plaintiffs repeat and reallege each and all of the allegations of their First Cause and Paragraph II of their

Second Cause with the same force and effect as if the same were here set forth in full.

II

When defendants made said false and misleading representations, they had no sufficient or reasonable ground for believing them to be true.

III

Plaintiffs, and each of them, at the time said representations were made and subsequent thereto, were ignorant of their false and misleading nature and believed them to be true and accurate. In reasonable reliance thereon, plaintiffs were induced to and did in fact refrain from accepting said offer; had plaintiffs known, the true facts they would have accepted said offer and benefited from said "bargain sale."

IV

By reason of said false and misleading representations by the defendants, and plaintiffs' reliance thereon, plaintiffs have been damaged in the amount of $21,400,000.

FOURTH CAUSE

I

Plaintiffs repeat and reallege each and every allegation of their First Cause with the same force and effect as if the same were here set forth in full.

II

The plaintiffs, and each of them, were the express intended beneficiaries of said final consent judgment entered into between the plaintiffs and defendants of [sic.] said prior proceedings and approved by the Court.

III

The aforesaid final consent judgment stated that defendants planned a reorganization of the BLUE CHIP STAMP COMPANY including a method of divestiture of defendants' holdings in said company which was to be conducted and effected in good faith by defendants.

IV

Defendants' aforesaid false and misleading misrepresentations were a violation of the Court imposed duty of good faith and constituted a breach of said Final Consent Judgment.

V

As a direct and proximate result of defendants' breach of said Final Consent Judgment, plaintiffs were damaged in the amount of Twenty-One Million Four Hundred Thousand ($21,400,000.00) Dollars.

WHEREFORE, plaintiffs pray judgment against the defendants as follows:

1. For damages in the amount of Twenty-One Million Four Hundred Thousand ($21,400,000.00) Dollars;

2. The right to purchase shares of stock or units of Blue Chip Stamps on the price and terms offered in the 1968 offering;

3. For exemplary damages in the amount of Twenty-Five Million ($25,000,000.00) Dollars;

4. For interest;

5. For attorneys' fees for the representation of plaintiffs herein;

6. For cost of suit; and

7. For all proper relief.

Dated January 26, 1971.

J. J. BRANDLIN, JAMES E. RYAN
and RAY E. MCALLISTER

By /s/ J. J. BRANDLIN

J. J. BRANDLIN

Jury trial requested.

J. J. BRANDLIN, JAMES E. RYAN
and RAY E. MCALLISTER

By /s/ J. J. BRANDLIN

J. J. BRANDLIN

[Exhibit "A" to First Amended Complaint]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* v. BLUE CHIP STAMP COMPANY; ALEXANDER'S MARKETS; LUCKY STORES, INC.; MARKET BASKET; PURITY STORES, INC.; RALPHS GROCERY COMPANY; SAFEWAY STORES, INCORPORATED; THRIFTIMART, INC.; THRIFTY DRUG STORES CO., INC.; and VON'S GROCERY CO. *Defendants.*	CIVIL ACTION NO. 63-1552-F ENTERED:

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint in the United States District Court for the Southern District of California, Central Division, on December 26, 1963; each of the defendants having appeared and filed its answer denying the substantive allegations thereof; and the plaintiff and the defendants, by their attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, without the taking of any evidence, and without this Final Judgment constituting any evidence or admission by any party in respect to any issue of fact or law herein;

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein and upon the consent of the parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I.

This Court has jurisdiction of the subject matter of this action and of the parties consenting hereto. The complaint states claims for relief against the defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended, entitled "An Act to protect trade and commerce against unlawful restraint and monopolies," commonly known as the Sherman Act.

II.

For the purposes of this Final Judgment:

(A) "Person" shall mean an individual, partnership, firm, association, corporation or other legal or business entity;

(B) "Trading stamp business" shall mean the distribution for compensation, of trading stamps to any person for issuance to its customers, employees or others, and the redemption of said stamps for merchandise or money;

(C) "Trading stamp company" shall mean a person engaged in the trading stamp business;

(D) "Capital Assets" shall mean land, buildings, leasehold improvements, furniture and fixtures, warehouse equipment, delivery equipment and automobiles.

(E) "Southern California" is that part of California south of the line formed by the northern boundaries of San Luis Obispo, Kern and San Bernardino Counties.

(F) "New Blue Chip" shall mean a purchaser of, or any other successor to, Blue Chip's trading stamp business pursuant to Section VI herein or a reorganized company pursuant to Sections V or VII herein.

(G) "Reorganization" shall mean a reconstitution of the stock structure of Blue Chip and shall include the creation of a new company to which the assets and liabilities of Blue Chip are transferred, or into which Blue Chip is consolidated or merged.

III.

The provisions of this Final Judgment applicable to any defendant and any person agreeing to be bound shall also apply to each of its subsidiaries, successors, assigns, officers, directors, and employees, and to all other persons in active concert or participation with such defendant or persons who shall have received actual notice of this Final Judgment by personal service or otherwise, but shall not apply to transactions solely between or among such defendant or person and its officers, directors, employees, parent company, subsidiaries and affiliates, or any of them.

IV.

Each of the retailer defendants is enjoined and restrained from:

(A) Combining or conspiring to restrain trade in, or monopolizing or attempting to monopolize the trad-

ing stamp business in the State of California; or carrying out, directly or indirectly, any such combination, conspiracy, attempt to monopolize or monopolization;

(B) Entering into any contract, agreement or understanding with any other user of trading stamps in the same line of business:

(i) To refrain, in the State of California or in particular areas thereof, from using trading stamp services entirely or from using the trading stamp services of any particular person or persons; or

(ii) To limit the rate of issue employed in distributing trading stamps to their respective customers in such state;

(C) Acting jointly with any other user of trading stamp services in the same line of business to organize or acquire a trading stamp company to operate in the State of California except as provided in Sections V, VI or VII hereof.

Provided, that this Section IV shall not apply to a retailer defendant, acting independently: (i) in obtaining or entering into any contract to obtain trading stamp services from any trading stamp company; or (ii) when such defendant is engaged in the trading stamp business (either directly or through a subsidiary or affiliate), in furnishing or entering into any contract to furnish trading stamp services to any person, and provided further that this Secion IV shall not apply to the provision of trading stamp services by any trading stamp company which is not named as a defendant herein.

V.

Blue Chip is ordered and directed to present to the Court, within 60 days following the date of entry of this Final Judgment, a plan for the reorganization of Blue Chip Stamp Company. The plan shall be substantially in accordance with either of the plans heretofore furnished to plaintiff. Upon approval of the plan by the Court, Blue Chip shall make bona fide and diligent efforts to reorganize the company pursuant to the said plan. If at any time, in plaintiff's judgment, such efforts are not being made, plaintiff may apply to the Court for an order directing that this Section V shall no longer apply. In the event that such order issues, Blue Chip shall be required to divest pursuant to Section VI or to reorganize pursuant to Section VII hereof.

VI.

(A) In the event that Section V becomes inapplicable Blue Chip is ordered and directed to divest, with all due diligence, within 15 months from the date upon which Section V shall no longer apply, all of the company's capital assets, goodwill, and the right to the service mark and to the use of the name "Blue Chip," and, following such divestiture, to discontinue issuance of trading stamps, cease doing business as on operating company and thereafter to wind up its affairs and dissolve consistent with the applicable laws of the State of California.

The divestiture shall be made upon the following terms and conditions:

(1) The purchaser or successor to Blue Chip's trading stamp business shall agree to enter its appearance in this proceeding and shall furnish its written consent

to be bound by the applicable provisions of this Final Judgment.

(2) The purchaser or successor shall agree to engage in the trading stamp business in California for a reasonable period of time.

(3) The purchaser or successor shall contract with Blue Chip on mutually satisfactory terms for the redemption of all outstanding trading stamps theretofore issued by Blue Chip and said contract shall insure discharge of Blue Chip's redemption obligations and shall require the purchaser or successor to redeem its stamps interchangeably with the trading stamps theretofore issued by Blue Chip.

(4) The purchaser or successor shall assume such other obligations as Blue Chip and it may agree and Blue Chip shall transfer such cash, securities or other assets as it and Blue Chip may agree.

The said divestiture may be made by a sale of assets, a sale of stock of a corporation which controls the assets, or in any other manner not otherwise inconsistent with the terms of this decree. Provided, that in the event that all of the stockholders of Blue Chip dispose of their stock to a purchaser or successor said disposal shall be regarded as a divestiture by Blue Chip for the purposes of this Final Judgment.

(B) Blue Chip shall make known the availability of the assets for sale. Blue Chip shall furnish to bona fide prospective purchasers making inquiry to it, such information as is reasonably necessary for them to proceed with negotiations looking toward the ultimate acquisition of the assets to be divested and shall furnish plaintiff concurrently with the name of any such prospective purchaser. Blue Chip shall render quarterly reports to the

Assistant Attorney General in charge of the Antitrust Division concerning its efforts to effectuate the divestiture required, the first such report to be rendered within 30 days of the date that Section V shall no longer apply.

(C) At least 30 days in advance of the closing date specified in any contract for sale, Blue Chip shall supply plaintiff with the name of the proposed purchaser, the purchase contract, and with such other information in its possession as is material to the proposed sale. If plaintiff requests, the said closing date shall be extended to the extent necessary to afford plaintiff 60 days between the date of the receipt of the said information and the closing date. Blue Chip may close any sale unless plaintiff serves upon Blue Chip, at least 15 days in advance of the closing date, written notice that plaintiff objects thereto. If plaintiff serves such written notice with respect to a sale to a purchaser engaged in the trading stamp business, or a purchaser engaged in the operation of retail food stores in the State of California, such sale shall not be closed. If plaintiff serves such written notice with respect to any other sale, the sale shall not be closed unless approved by the Court. The time period set forth in Section VI(A) above shall be tolled during the pendency of any extension or of any proceeding under this Section VI(C).

(D) The divestiture ordered and directed by Section VI(A) of this Final Judgment shall be made in good faith and shall be absolute and unqualified except as follows:

(1) Nothing herein contained shall be deemed to prohibit Blue Chip from retaining, accepting and enforcing a bona fide lien, mortgage, deed of trust or any other form of security reasonably necessary to secure full payment of the price at which the divested property

is disposed of or sold or to secure any other obligation of a purchaser or successor, provided that if Blue Chip shall regain ownership of or control over the property divested as a result of any lien, mortgage, deed of trust, or other undertaking Blue Chip shall be required to terminate such ownership or control within 18 months thereafter.

(2) In the event that Blue Chip receives, as a result of any divestiture hereunder, stock of a corporation which controls the divested assets:

(a) Blue Chip shall be required: (i) to dispose of any amount of such stock in excess of 10% of the outstanding common stock of such corporation within one year following the date of receipt thereof or within 22 months following the date Section V shall no longer apply, whichever is earlier, provided that in no event shall such disposal be required within less than three months following the date of receipt of such excess; and (ii) to dispose of the balance of such stock no later than the date of final distribution in liquidation; and (iii) pending disposal, to cause any voting rights of such stock to be exercised by a financial institution or other third party who is acceptable to plaintiff or approved by the Court; and

(b) In the event Blue Chip distributes such stock to its shareholders, no distribution shall be made pursuant to which any Blue Chip shareholder will retain more than 1% of the outstanding common stock of the said corporation unless the plan of distribution is acceptable to plaintiff or approved by the Court.

VII.

In the event that Section V becomes inapplicable, Blue Chip may also enter into a reorganization pursuant to a plan for the reorganization of Blue Chip Stamp Company acceptable to the Court. The plan shall be substantially in accordance with either of the plans heretofore furnished to plaintiff or in accordance with any other plan acceptable to Blue Chip and to plaintiff.

VIII.

(A) Blue Chip is ordered and directed to continue its trading stamp business and to continue to promote its trading stamp service until completion of the reorganization set forth in Sections V or VII above or until the divestiture set forth in Section VI above. Until such reorganization or divestiture Blue Chip is enjoined and restrained from:

(1) Refusing to provide a trading stamp service or imposing any limitation on such service to any person because of: (i) the presence in the same locality of any establishment operated by another person using Blue Chip's stamp service; (ii) the rate of issue employed by such person in offering Blue Chip's or any other person's stamps; or (iii) the use by such person of any other trading stamp service;

(2) Coercing or compelling any person: (i) to limit the rate of issue employed in offering Blue Chip's or any other person's stamps; or (ii) to refrain from using any other trading stamp service.

(B) New Blue Chip, in the event that it is not already a party hereto, shall enter its appearance in this proceeding and give its consent to be bound by the applicable provisons of this Final Judgment. A purchaser of assets

pursuant to Section IX hereof shall enter its appearance in this proceeding and give its consent to be bound by the applicable provisions of this Final Judgment. New Blue Chip and such purchaser are enjoined and restrained from:

(1) Refusing to provide a trading stamp service or imposing any limitation on such service to any person because of: (i) the presence in the same locality of any establishment operated by another person using the company's stamp service; (ii) the rate of issue employed by such person in offering the company's or any other person's stamps; or (iii) the use by such person of any other trading stamp service;

(2) Coercing or compelling any person (i) to limit the rate of issue employed in offering the company's or any other person's stamps; or (ii) to refrain from using any other trading stamp service;

(3) Having as an officer or employee any person who, while holding such position, also serves as an officer, director, or employee of any person using trading stamp services; or from having, for a period of ten years following the date of entry of this Final Judgment, as a director, any person who, while holding such position, also serves as an officer, director or employee of any person who was a Blue Chip stockholder in 1956 or 1957.

(C) Each of the retailer defendants is enjoined and restrained for a period of ten years following the date of entry of this Final Judgment:

(1) From having as an officer, director, or employee any person who, while holding such position, also serves as an officer, director or employee of New Blue Chip; or

(2) From exercising any right which it might acquire to vote for the election of any official of New Blue Chip; *provided* that a retailer defendant may cause such right to be exercised independently by a financial institution or other third party acceptable to plaintiff or approved by the Court.

Each retailer defendant shall be free to utilize or not utilize the trading stamp services of Blue Chip and New Blue Chip and, except as provided in this Section VIII(C), to exercise the same rights and privileges available to every other user of the stamp services of Blue Chip or New Blue Chip.

IX.

New Blue Chip shall, within 30 months after the date of completion of the reorganization under Sections V or VII above or the divestiture under Section VI above present for the approval of the Court a plan which shall include the following terms:

(1) New Blue Chip shall offer for sale one-third of its then existing trading stamp business in the State of California. The business to be offered for sale shall be located within a contiguous geographic area within Southern California.

(2) A purchaser shall be permitted to acquire the business only upon the condition that it enter its appearance in this proceeding and agree: (i) to be bound by the applicable provisions of Sections VIII(B), IX, X and XI of this Final Judgment and (ii) to engage in the trading stamp business for a reasonable period of time. A purchaser shall have the right, if it so elects, to redeem New Blue Chip trading stamps within the contiguous area for the period of one year following

the consummation of the sale. Plaintiff shall have the right to object to a purchaser in the same manner as it may object to a purchaser under Section VI(C) above.

(3) New Blue Chip shall not, during the period of one year following the consummation of the sale: (i) knowingly allow any person operating retail establishments in the contiguous area to issue New Blue Chip stamps to customers of such establishments; or (ii) furnish New Blue Chip stamps to any person with knowledge that the stamps will be issued to customers at any retail establishment in the contiguous area; or (iii) otherwise engage in the trading stamp business in the contiguous area except that, if the purchaser does not elect to redeem New Blue Chip stamps or if the purchaser fails to perform in accordance with his redemption obligations, New Blue Chip shall have the right to redeem its outstanding stamps in said area. Following the said one year period, New Blue Chip shall offer its trading stamp service in the contiguous area.

X.

For the purpose of securing compliance with this Judgment and for no other purpose:

(A) Any duly authorized representative or representatives of the Department of Justice shall, upon written request by the Attorney General or the Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to any defendant, New Blue Chip, or any purchaser under Section IX hereof, made to its principal office, and subject to any legally recognized privilege, be permitted:

(1) Access during the office hours to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under

the control of any person specified in this Section X(A) related to any matters contained in this Judgment;

(2) Subject to the reasonable convenience of, and without restraint or interference from, any person specified in this Section X(A), to interview officers or employees of any such person who may have counsel present, regarding any such matters.

(B) Upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, any defendant, New Blue Chip or a purchaser under Section IX shall submit such additional reports in writing with respect to the matters contained in this Final Judgment as may be requested. Provided that no information obtained by the means provided for in this Section X shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XI.

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and direction as may be necessary or appropriate for construction, carrying out, modification, termination or enforcement of or compliance with the provisions of this Final Judgment and for the punishment of violations thereof.

Dated: June 5, 1967

_____

United States District Judge

[Exhibit "B" to First Amended Complaint]

O'MELVENY & MYERS
433 South Spring Street
Los Angeles, California 90013
620-1120
Attorneys for Certain Defendants

[Filed October 13, 1967]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* vs. BLUE CHIP STAMP COMPANY; ALEXANDER'S MARKETS; LUCKY STORES, INC.; MARKET BASKET; PURITY STORES, INC.; RALPHS GROCERY COMPANY; SAFEWAY STORES, INCORPORATED; THRIFTIMART, INC.; THRIFTY DRUG STORES CO., INC.; and VON'S GROCERY CO., *Defendants.*	CIVIL ACTION NO. 63-1552-F REVISED ORDER APPROVING PLAN OF REORGANIZATION WITH CERTAIN CONDITIONS

The defendants having lodged with the Court on August 3, 1967 a Plan of Reorganization (copy of which is attached hereto as Exhibit A) pursuant to Paragraph V of the Final Judgment entered herein on June 5, 1967, and the matter having come before the Court on defendants' motion for approval of the said Plan of

Reorganization, which said motion was noticed for hearing on August 21, 1967 and thereafter continued to August 29, 1967, and notice of said hearing and of the continuance thereof having been given to the parties hereto and to the attorneys for the various persons who have appeared in this matter as amicus curiae or otherwise, and the Court, having heard the arguments and considered the same, and having determined that the said Plan of Reorganization is substantially in accordance with "Reorganization Plan 'B' For Blue Chip Stamp Company" lodged with this Court on April 28, 1967 and filed June 5, 1967, now Orders as follows:

1. The Court finds that the said Plan of Reorganization of Blue Chip Stamp Company is substantially in accordance with Reorganization Plan "B" for Blue Chip Stamp Company lodged on April 28, 1967 and filed June 5, 1967.

2. The Court approves the said Plan of Reorganization subject to the following conditions:

(a) Except to the extent that restraints are imposed on the retailer defendants by the Final Judgment or the Plan of Reorganization with respect to the purchase of additional shares by any of them, or are imposed by the purchase agreements with management employees or by the Securities Act of 1933 on shares to be subject to a qualified stock option plan, there shall be no restraint upon free alienation of any of the shares to be issued.

To enable the retailer defendants and the other present stockholders of Blue Chip Stamp Company to sell any or all of their shares in compliance with the Securities Act of 1933, New Company shall register under that Act the shares of such stockholders at such time or times as may be requested by any of

them, but in no event shall New Company be obligated to so register more than one time in any calendar year. New Company shall not be obligated to pay any of the expenses of such registrations nor to keep any registration referred to in this subsection (a) effective for longer than six months; provided, however, that New Company shall be obligated to pay expenses (other than underwriting fees) for one registration if the request for the same shall have been made during the three months period commencing January 1, 1969 and for one additional registration if the request for the same shall have been made during the three months period commencing January 1, 1970. Within ten days of receipt of any written request from such a stockholder to register its shares, New Company shall give notice thereof to all other of said stockholders and offer them an opportunity to join in the registration so requested. The Company shall file such Registration Statement with the Securities and Exchange Commission on or before May 31 of that year.

With the exception of the two registrations which may be requested in the two three-month periods referred to above, all expenses, direct and indirect, of registrations, if any, requested by such a stockholder or stockholders shall be paid for by it or them, and within ten days of receipt of such a written request from such a stockholder to register its shares, New Company shall give notice thereof to all other such stockholders and offer them an opportunity to join in and share the expense of the registration so requested.

If at any time prior to June 5, 1977, as a result of purchases by New Company of its shares, the aggregate of shares beneficially owned by the retailer defendants exceeds 43% of (a) the Company's outstand-

ing shares and (b) the Company's shares reserved for issuance pursuant to a qualified stock option plan, the Company shall present to the Court within 60 days a plan for disposing of a number of shares sufficient to reduce the percentage of shares beneficially owned by the retailer defendants below such 43%.

(b) Within 60 days after the election of the Permanent Directors of the New Company, the New Company shall present to the Court a plan for the disposition of all unsubscribed shares.

(c) Approval of the Plan of Reorganization does not constitute a finding or any expression of opinion with respect to California law, or as to whether the provisions of said Plan with respect to indemnification are or will be valid or enforceable.

DATED: October 13, 1967.

/s/ WARREN J. FERGUSON
United States District Judge

APPROVED AS TO FORM:

STANLEY E. DISNEY
LAWRENCE W. SOMERVILLE

By /s/ STANLEY E. DISNEY
Stanley E. Disney
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Attorneys for Certain Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* v. BLUE CHIP STAMP COMPANY; ALEXANDER'S MARKETS; LUCKY STORES, INC.; MARKET BASKET; PURITY STORES, INC.; RALPHS GROCERY COMPANY; SAFEWAY STORES, INCORPORATED; THRIFTIMART, INC.; THRIFTY DRUG STORES CO., INC.; and VON'S GROCERY CO., *Defendants.*	CIVIL ACTION NO. 63-1552-F PLAN OF REORGANIZATION OF BLUE CHIP STAMP COMPANY SUBMITTED PURSUANT TO SECTION V OF FINAL JUDGMENT ENTERED JUNE 5, 1967

I.

GENERAL STATEMENT OF PLAN OF REORGANIZATION

Pursuant to the decree entered by the United States District Court (the "Court") on June 5, 1967 (the "Decree"), Blue Chip Stamp Company, a California corpora-

tion ("Blue Chip"), has developed the plan of reorganization hereinafter set forth (herein the "Plan").

The Plan contemplates the formation of a new California corporation (herein "New Company") with an authorized capitalization of 1,400,000 shares of Common Stock, par value 33⅓ cents per share, the issuance of a single share of its stock for cash to Blue Chip, the merger of Blue Chip into it with the result that each holder of Blue Chip stock shall receive 1,200 shares of the Common Stock of New Company for each Blue Chip share held (of whichever class). This will result in there being outstanding (assuming no Blue Chip shareholders dissent) 621,600 shares of New Company, all owned by the present shareholders of Blue Chip. Prior to the merger the stockholders of Blue Chip will make a capital contribution in the aggregate amount of $155,400 in cash to Blue Chip. An offering of approximately 621,600 shares of its Common Stock will then be made by New Company to users of Blue Chip stamps (who issue stamps to their retail customers as a reward for patronage) other than users who are also shareholders of Blue Chip (such users to whom such offering is to be made are hereinafter referred to as "Users") on a prorata basis determined by the quantity of stamp pads issued to Users during the period subsequent to March 1, 1964 and prior to a date to be determined which will be not more than 90 days prior to the effective date of the registration statement hereinafter referred to. The offering will be made in units consisting of three shares of the Common Stock of New Company and one $100 principal amount debenture for a cash consideration of $101. New Company will also adopt a qualified stock option plan and will grant options pursuant thereto to key employees covering an aggregate of 110,400 shares of its Common Stock. New Company will also offer to sell 27,600 shares to key executive em-

ployees at a price of 33⅓ cents per share. The steps taken pursuant to the Plan will be substantially in accordance with those set forth in Sections II and III below.

II.

VARIOUS STEPS OF THE PLAN

A. Formation of New Company.

A California corporation will be formed with an authorized capitalizaton of 1,400,000 shares of Common Stock of the par value of 33⅓ cents per share. The articles of incorporation will provide for three incorporators who will be the first directors.

After the filing of the articles of incorporation with the Secretary of State of the State of California, the incorporators will hold an organization meeting adopting by-laws, stock certificates, seal, providing for a principal office and various other ministerial matters. In addition the first directors will authorize the filing of an application for permit with the Commissioner of Corporations of the State of California (the "Commissioner") to permit the sale and issuance of one share of its stock to Blue Chip and the sale of such share in accordance therewith. Temporary officers will be elected.

The application for permit will be filed with the Commissioner and a permit obtained as promptly as possible thereafter. A share will then be sold to Blue Chip for $1. Blue Chip, as the sole shareholder of New Company, will then amend the by-laws to provide for a board of 11 directors. Immediately thereafter the first directors will tender their resignations and elect 11 temporary directors, all of whom will be the present directors of Blue Chip. The first directors will also elect as officers of New Com-

pany the present officers of Blue Chip, each holding the respective office that he holds in Blue Chip. Following the close of the subscription offering to Users, there shall be a meeting of the shareholders of New Company for the purpose of electing a new board of directors (the "Permanent Directors").

B. Merger of Blue Chip into New Company.

After the first share of New Company is issued, Blue Chip and New Company will enter into an agreement of merger which will provide for the issuance, upon the merger, of 1,200 shares of the Common Stock of New Company for each share of Blue Chip of either class then outstanding. New Company will, expressly, and by operation of law under the California statutes governing statutory mergers, acquire all the assets of Blue Chip. In consideration for such transfer of assets, New Company will assume all liabilities of Blue Chip arising out of its organization and operations prior to the date the Decree becomes final and not subject to appeal, including, without limitation, those existing by virtue of antitrust claims against Blue Chip, its past and present officers, directors and shareholders, by virtue of Blue Chip's organization and operations and liabilities of Blue Chip, its officers, directors and shareholders arising from carrying out this plan of reorganization. A special shareholders' meeting of Blue Chip will be called and noticed, which notice shall be accompanied by a statement of the terms of the proposed merger and also of the contemplated offering to management personnel and to Users. The special meeting of Blue Chip shareholders will be held approving the merger and, concurrently with this meeting Blue Chip, as the sole shareholder of New Company, will approve the merger by written consent. Notice will then be mailed to all shareholders of both corporations of the approval

of the merger, thus starting the statutory period within which a dissenter may give notice of his dissent.

Immediately prior to the effectiveness of the registration statement concerning the offering to Users, the merger agreement will be filed with the Secretary of State of the State of California, thus effecting the merger. Each of such defendants shall, prior to the shareholder meeting for the election of Permanent Directors, deliver its shares to a separate and independent trustee acceptable to the Department of Justice or the Court. Such defendants may sell any of their shares at any time, but are prohibited from purchasing any additional shares for a period of ten years.

C. Offering to Users.

1. California Commissioner of Corporations.

New Company will file an application with the Commissioner of Corporations of the State of California for a permit authorizing it to sell, in accordance with the terms of offering set forth below, to the Users units consisting of three shares of its Common Stock combined with one $100 principal amount debenture for a cash price of $101.

2. Securities and Exchange Commission.

New Company will prepare and file a registration statement on Form S-1 under the Securities Act of 1933 with the Securities and Exchange Commission (the "SEC") covering the offering to Users. It is contemplated that there will be a prefiling conference with the SEC and a request for expeditious examination of the registration statement and the issuance of a letter of comments thereon. As soon as practicable after the comments are received, an appropriate amendment or amendments to the registration statement will be filed in response

thereto. The registration statement relating to the offering will be declared effective and the indenture, pursuant to which the debentures will be issued, will be qualified under the Trust Indenture Act of 1939.

3. The Units.

Each unit shall consist of three shares of the Common Stock of New Company and one $100 principal amount debenture. The debentures shall mature ten years after their date, shall bear interest, payable quarterly, at 6% or at one-half per cent above the prime rate in effect in Los Angeles on the date the registration statement is initially filed with the Securities and Exchange Commission, whichever is higher, shall be subordinated to claims or causes of action, including, without limitation, claims under the antitrust laws, aganst Blue Chip and its past and present officers, directors and stockholders relating to Blue Chip operations prior to the date the Decree becomes final and not subject to appeal, or arising from the reorganization covered by this Plan, may be paid (in whole or in part) without penalty at any time after six years after their date, and will be entitled, after provisions for subordination, to mandatory sinking fund payments equal to 20% of the aggregate principal amount outstanding on the sixth anniversary of their date of issuance on such date and on the seventh, eighth and ninth such anniversary dates. The debentures will be issued pursuant to an indenture which will be qualified under the Trust Indenture Act of 1939 and will contain other usual provisions.

4. Offer to Users.

As soon as the registration statement has been declared effective by the SEC: each past User whose name appears on Blue Chip Records as a "house account"

during the period subsequent to March 1, 1964 and prior to a date to be determined which will be not more than 90 days prior to the effective date of the registration statement referred to above, and each current user, will have mailed to its latest address according to the records of Blue Chip a copy of the prospectus, together with a notice that such Users will be offered the opportunity to purchase units after their respective entitlements have been ascertained.

Advertisements will also be placed in appropriate newspapers advertising that an offering of units will be made to the Users of stamps subsequent to March 1, 1964 and advising that any of such Users who have not been sent the mailing by the Company referred to above may request a copy of the prospectus and a form on which such User may establish his usage since March 1, 1964 for the purpose of participating in the offering. Thirty days after the publication of the first such advertisement, the right of Users to establish their usage shall terminate.

Immediately thereafter New Company shall commence the preparation of a list of all Users who have been sent the mailing referred to above and those who have responded to the advertisement and have established their eligibility as Users. Such list shall show, with respect to each User, the number of units to which such User is entitled, determined as set forth below. As soon as practical thereafter there shall be mailed to all such Users a subscription form on which will be stated the maximum number of units that the respective User is entitled to purchase. The subscription form shall state that the User may purchase any lesser number of units. Such subscription rights shall not be transferable and the securities constituting the Units purchased will be issued only in the name of the User.

For a period of 30 days after all subscription forms are mailed out, each User may complete the form agreeing to buy the number of units (up to the stated maximum) which he sets forth thereon and send the form, together with a check covering the purchase price of such units, to the Subscription Agent, which shall be a bank located in Los Angeles, California. Such subscription offer shall terminate at the close of business on the thirtieth day after the mailing of the subscription form. New Company shall instruct the Subscription Agent to issue securities comprising the units purchased and send them to the purchasers thereof, all in accordance with the terms of the offer, provided that no units shall be issued until the check representing the purchase price has cleared.

5. Method of Determining User's Entitlement to Units.

The number of units which each User shall be entitled to purchase shall be determined as follows: 207,200 units (the total number of units to be offered) will be available to all nonstockholder users during the period between March 1, 1964 and a date to be determined which will be not more than 90 days prior to the effective date of the registration statement referred to above. Each eligible User will be entitled to units as its total use during such period bears to the total use by all nonstockholder users during such period, with a minimum of one unit. No fractional units shall be issued. The number of units to which any User is entitled shall be rounded to the nearest whole unit (with all Users being entitled to a minimum of one Unit), and those entitled to an even one-half unit shall be rounded to the next higher full unit.

D. Offering to Management and Qualified Stock Option Plan.

1. California Commissioner of Corporations.

New Company will file an application with the Commissioner of Corporations of the State of California for a permit authorizing it to sell 27,600 shares of its Common Stock to management employees at a price of 33⅓ cents per share. It will concurrently apply for the permit of the Commissioner authorizing the grant of options pursuant to the qualified stock option plan and the issuance of shares pursuant thereto.

2. Terms of Offering to Management.

The shares to management employees will be sold immediately after the merger under a separate purchase agreement with each employee which will provide, among other things, that the shares subject thereto cannot be sold, transferred or hypothecated by the purchaser for a specified period of time and that during such period of time if such employee voluntarily (as defined in the agreement) terminates his employment with New Company or attempts to sell his stock in violation of the agreement, New Company shall have the right to buy such shares at the price which he paid for them. Such restrictions and the resale obligation will terminate with respect to 20% of each management employee's shares in each of five consecutive years, with all such restrictions and obligations being terminated not later than January 1, 1974.

3. Terms of the Qualified Stock Option Plan.

The qualified stock option plan will be adopted by the directors of New Company and approved by its shareholders immediately following the merger. The qualified stock option plan will cover 110,400 shares of New Com-

pany Common Stock, will provide for the grant of options thereon at not less than the fair market value of the shares on the date of grant, the options granted will be exercisable in installments of 25% thereof at the end of each of the first, second, third and fourth years after the date of grant, the person acquiring the shares on exercise of the option will give an investment letter with respect thereto (unless the stock is registered under the Securities Act of 1933), and the options shall not be transferable, except to a limited extent upon the death of an optionee. The options will terminate not more than five years after the date of grant. It is contemplated that the option plan will contain provisions which are standard in such plans.

E. Compliance with Decree by New Company.

Blue Chip and New Company (as Blue Chip's successor under Section III of the Decree) will conduct the operations of the trading stamp business in accordance with the provisions of Section VIII(A) of the Decree. New Company will be regarded as "New Blue Chip" under the Decree upon the election of the Permanent Directors of New Company. The Permanent Directors will authorize and cause New Blue Chip to enter its appearance in *United States v. Blue Chip Stamp Company, et al.* and to give the required consent pursuant to the provisions of Section VIII(B) of the Decree. At that point New Blue Chip will become bound by the provisions of Section VIII(B) of the Decree; New Blue Chip will engage in the trading stamp business for a reasonable period of time thereafter; and New Blue Chip and the stockholder defendants will thereafter be precluded from having common officers, directors and employees. (See Sections VIII(B) and (C) of the Decree.) As is indicated above, prior to the shareholder meeting for the election of Permanent Directors the stockholder defendants will have placed their stock

in trust so that the voting rights of the shares of each of the stockholder defendants may be exercised only by persons acceptable to the Department of Justice or to the Court.

F. Disposition of Unsubscribed Shares, If Any.

Based upon the outcome of the offering to Users and employees, the Permanent Directors will take such steps as may be necessary to complete the reorganization by obtaining an appropriate disposition of any unsubscribed shares.

III.

PRINCIPAL ACTIONS

The following sets forth a summary of specific steps contemplated for effecting the Plan. New Company will try to complete the action necessary in connection with carrying out the Plan as expeditiously as is reasonably practicable. Certain events are dependent upon action by other persons or entities and the speed with which such action will be taken will not always be within the control of New Company.

1. Incorporate New Company.

2. File application with Commissioner of Corporations of the State of California (the "Commissioner") for a permit authorizing the issuance of one share of New Company to Blue Chip.

3. File application with the Commissioner for a negotiating permit authorizing the signing of the merger agreement.

4. Obtain permit.

5. Boards of directors of Blue Chip and New Company approve merger.

6. Send notice of special meeting of stockholders and proxy statement to shareholders of Blue Chip.

7. File application with the Commissioner for a definitive permit authorizing the merger and the issuance of shares.

8. File registration statement with the SEC under the Securities Act of 1933 to register the units to be offered to Users.

9. File application with the Commissioner for a permit authorizing the offering to Users, and sale of shares to management employees and the grant of options under the qualified stock option plan and the sale of shares pursuant thereto.

10. Hold special meeting of stockholders of Blue Chip to approve merger; stockholder of New Company consents to merger.

11. Send notice to shareholders of Blue Chip advising as to approval of merger.

12. Take any other necessary action with respect to blue sky or securities laws of any other states in which the offering will be made.

13. Receive comments on the registration statement from the SEC.

14. File the first amendment to the registration statement with the SEC.

15. File a second amendment to the registration statement, if necessary, with the SEC.

16. Obtain permit authorizing the merger and the offering of units, shares and options from the Commissioner.

17. File agreement of merger with the Secretary of State of the State of California effecting merger.

18. Hold meeting of New Company stockholders to adopt qualified stock option plan.

19. Registration statement declared effective.

20. Sell shares to management employees.

21. Mail copy of prospectus to all known Users, together with advice that offering will be forthcoming.

22. Make a public solicitation for information concerning other Users who would be entitled to participate in the offering.

23. Right of Users to prove their entitlement to units or to indicate their interest in participating terminates.

24. Send subscription forms to Users entitled to participate in the offering advising as to the number of units to which the User is entitled.

25. Subscription period ends.

26. Complete issue of units to those purchasing them.

27. Select trustees to hold shares and obtain necessary approval thereof.

28. Hold meeting of shareholders to elect Permanent Directors.

29. Authorize and enter appearance of New Blue Chip.